SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 257

GORDON P. HAYNES AND ESSIE M. HAYNES,
PETITIONERS,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

No. 5001 Civil Action

GORDON P. HAYNES AND ESSIE M. HAYNES, Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, Defendant.

COMPLAINT—Filed October 4, 1954

1.

Jurisdiction is invoked pursuant to the provisions of Title 28, Section 1346 (a) (1) (i) (ii), United States Code, to recover income tax erroneously assessed against and illegally collected from plaintiffs by defendant, the total amount sought to be recovered herein not exceeding $10,000, and the Collector of Internal Revenue who collected same now being dead and no longer in office.

2.

During 1949 plaintiffs paid to Marion H. Allen, Collector of Internal Revnue for Georgia, by means of withholding tax, the sum of Three Hundred Eighteen and 44/100 Dollars ($318.44), representing income tax on the sum of $2100.00 paid to plaintiff Gordon P. Haynes as sickness disability benefits for the year 1949 by the Southern Bell Telephone and Telegraph Company. The said Marion H. Allen, Collector of Internal Revenue, thereafter died on or about September 10, 1952, and is no longer in office.

[fol. 2]

3

On March 3, 1953, plaintiffs filed with the Director of Internal Revenue for Georgia their claim for the refund of said amount erroneously assessed and illegally exacted from them by defendant, specifying therein as grounds for recovery that the sum of $2100.00 paid to plaintiff Gordon P. Haynes by the Southern Bell Telephone and Telegraph

Company was sickness benefits, and as such was exempt from taxation under Title 26, Section 22 (b) (5), of the United States Code.

4.

For the reasons set forth in said claim for refund and hereinbefore specified, the above mentioned taxes were erroneously assessed against and illegally collected from plaintiffs (they being husband and wife and filing a joint return of income for tax purposes for 1949).

5.

Plaintiffs were notified on June 2, 1954, that their claim for a refund of said amount of $318.44 had been disallowed in full by direction of the Commissioner; and plaintiffs now file this their suit for the recovery of said sum within two years after the receipt of said notice.

Wherefore, plaintiffs demand judgment against defendant for the sum of $318.44 with interest thereon at 6% per annum, as provided by law.

/s/ John H. Hudson, /s/ William R. Hudson, Attorneys for Plaintiffs, 521 Connally Building, Atlanta 3, Georgia

Summons and Marshal's return omitted.

Filed October 5, 1954.

[fol. 3] IN UNITED STATES DISTRICT COURT

ANSWER—Filed December 6, 1954

The defendant, United States Attorney, by its attorney, James W. Dorsey, United States Attorney for the Northern District of Georgia, answering herein, the allegations in plaintiffs' complaint:

First

Denies the allegations of such complaint not admitted, qualified or otherwise specifically referred to below;

Second

1. Denies the allegations in paragraph 1, except that it is admitted that jurisdiction is invoked pursuant to the provisions of Title 28, United States Code, Section 1346 (a) (1), as amended, to recover income tax assessed against and collected from plaintiffs by defendant, that the total amount sought to be recovered therein does not exceed $10,000, and that the Collector of Internal Revenue who collected the tax is no longer in office.

2. Denies the allegations in the first sentence of paragraph 2 and admits the allegations in the second sentence of paragraph 2, except that it is admitted that plaintiffs paid $723.84 in income tax liability for 1949.

3. Denies the allegations in paragraph 3, except that it is admitted that on March 3, 1953, plaintiffs filed with the Director of Internal Revenue for Georgia their claim for refund of 1949 income taxes in the amount of $318.44.

4. Denies the allegations in paragraph 4, except that it is admitted that plaintiffs, as husband and wife, filed a joint income tax return for 1949.

5. Admits the allegations in paragraph 5.

Wherefore, the defendant, United States of Amer-
[fol. 4] ica, having fully answered plaintiffs' complaint, prays that they take nothing in this suit, that their complaint be dismissed, and that defendant be allowed its costs herein.

/s/ James W. Dorsey, United States Attorney, Attorney for Defendant.
/s/ Slaton Clemmons, Assistant U. S. Attorney
/s/ Charles D. Read, Jr., Assistant U. S. Attorney.

Certificate of service ommitted.

Filed December 6, 1954.,

[fol. 5] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 5001

GORDON P. HAYNES, ESSIE M. HAYNES

v.

THE UNITED STATES OF AMERICA

Transcript of Trial

Before: Honorable William Boyd Sloan, Judge, January 6, 1955.

APPEARANCES

For the plaintiffs: John R. Hudson, Attorney, Wm. R. Hudson, Attorney, 98 Alabama Street, S. W., Atlanta 3, Georgia.

For the Government: Harlan Pomeroy, Special Assistant to the Attorney General, Tax Division, Department of Justice, Washington 25, D. C., Slaton Clemmons, Assistant United States Attorney, Charles D. Read, Jr., Assistant United States Attorney, Atlanta 3, Georgia.

(The above named case having come on for hearing before [fol. 6] the Court without a jury, witnesses sworn rule not invoked, and the following proceedings were had.)

Mr. John H. Hudson: We can very greatly shorten this case. There are some documents, Your Honor, a goodly number of documents here. As the Court probably knows already, this claim is based on a contention that the benefits paid under what the plaintiff will refer to as Exhibit A, which is the printed form of the plan—certain portions of that, may it please the Court, we think are relevant and pertinent, but Mr. Pomeroy has said that he did not, that he would not object to the whole thing, he wanted the whole plan to go in, and I can readily appreciate that. Now, he has —may I have that certificate?

Mr. Pomeroy: May it please the Court, the Government has a series of documents that it does want to introduce,

but it wants to have them properly identified by the witnesses and authenticated before it introduces them. I think we might wait until the Government presents its case.

OFFER IN EVIDENCE

Mr. Hudson: I was under the impression, may it please Your Honor, that where counsel make agreements and stipulations as to certain documents, that he doesn't need testimony to identify them, but that's all right. I was fixing to tender this on behalf on the plaintiff now and have it identified as Plaintiff's Exhibit A.

The Court: That is all right. Present it to the Clerk. Have it identified.

The Clerk: Plaintiffs Exhibit #1 being the Plan for Employees Pensions, Disability Benefits and Death [fol. 7] Benefits of the Southern Bell Telephone & Telegraph Company.

(Above booklet marked for identification only as Plaintiffs' Exhibit #1.)

The Court: I understand you offer that in evidence at this time?

Mr. Hudson: That is correct, Your Honor.

The Court: Is there objection to this plan?

Mr. Pomeroy: No, Your Honor. We have no objection.

The Court: It is in evidence.

(Plaintiffs' Exhibit #1 received in evidence.)

The Court: Now, is it stipulated that the sum sued for here was paid to the taxpayer, Gordon Haynes, by reason of illness under that plan? Is that stipulated?

STIPULATION OF COUNSEL

Mr. Hudson: Your Honor, the stipulation, I believe, is like this, if Your Honor please: The Telephone Company withheld the amount of Three Hundred Eighteen dollars forty-four cents ($318.44) of the money which was paid to Mr. Haynes, the plaintiff, and turned it in as taxable income for the year 1949. That is stipulated, may it please the Court.

It is further stipulated that this is merely an action on

the part of one of two plaintiffs for the recovery of this sum of money, three hundred eighteen dollars forty-four cents, and that Mrs. Essie M. Haynes is a mere nominal party; that she is not interested insofar as this suit is concerned, in the three hundred eighteen dollars forty-four cents.

[fol. 8] The Court: Yes, sir, I understand that, Mr. Hudson. I understand that the Telephone Company did retain the, or deduct from these payments the income tax, and did pay it to the Government, but it is your contention that that was improperly done, or erroneously done because these were sick benefits?

Mr. Hudson: That is correct, Your Honor.

The Court: Now, is there any stipulation in the record that the sums paid to Mr. Haynes were sick benefits under the plan?

Mr. Pomeroy: May it please the Court, the Government is prepared to agree that some Twenty-one hundred dollars was paid to the taxpayer in this case pursuant to the plan.

The Court: And paid to him and received by him as sick benefits?

Mr. Pomeroy: Yes, sir.

The Court: Under the plan?

Mr. Pomeroy: Sickness disability benefits under that plan.

The Court: Sickness disability benefits under that plan. All right. That is stipulated and let the record show that it is so stipulated.

Mr. Hudson: Now, Your Honor, there is a question in my mind as to whether there is any necessity for putting the plaintiff on the witness stand under those stipulations. Perhaps I had better do it, make him available to the Court and to counsel for the Government merely to identify him with this cause of action.

[fol. 9] The Court: Well, whatever you wish to do.

MR. GORDON P. HAYNES having been sworn, testified as follows:

Direct Examination.

By Mr. Hudson:

Q. Will you state your name, please, sir?

A. Gordon P. Haynes.

Q. Mr. Haynes, are you one of the plaintiffs in this action here?

A. Yes, sir, I am.

Q. This suit for a claim of a refund of money you paid to the, or was paid to the Treasury Department of the United States on your behalf?

A. Yes, sir. That is correct.

Q. Were you employed by the Southern Bell Telephone Company—Telephone and Telegraph Company in the year 1949?

A. Yes, sir, that is correct, I was.

Q. Tell the Court, please, sir, how long you had been employed by this Southern Bell Telephone & Telegraph Company, the first part of the year 1949?

A. How long——

Q. How many years were you employed by the Southern Bell Telephone & Telegraph Company prior to the year 1949?

A. Since 1921, sir.

Q. Now, you are the Gordon P. Haynes, plaintiff in [fol. 10] this case, on whose behalf the Southern Bell Telephone & Telegraph Company turned over to the Treasury Department this sum of money which you claim was not taxable?

A. I am, sir.

Q. How did this disability arise, if there was any disability, Mr. Haynes?

A. This—you mean the nature of the illness, sir?

Q. Yes, sir.

A. It was recurring spells of what is known as amnesia, according to the doctor, and dizzyness caused by quite a bit of pain in my foot, brought about by a previous accident a few years before that time.

Q. Two years before 1949?

A. About the exact——

Q. Just what is your best recollection as to when the accident occurred, and also the date when this alleged disability occurred?

A. The original accident occurred in 1946, when I had an accident.

Q. Well, tell the Court please——

The Court: As I understand it, there is no issue with respect to the illness in any way, is there?

Mr. Pomeroy: That is correct, Your Honor. We have no dispute at all.

The Court: All right. It is stipulated that these sums were paid to him as a result of illness under this plan.

[fol. 11] Mr. Hudson: During the year 1949?

The Court: That is right.

Mr. Pomeroy: I would like to make one reservation. We say these amounts were paid under the plan. We do not admit they were necessarily sick disability benefits. As a matter of fact, they were simply so entitled under the plan. We reserve, of course, the right to assert they are a continuation of compensation, as pointed out at the very beginning.

The Court: Yes. There is no dispute that the man was ill, and that they were paid to him as——

Mr. Pomeroy: That is correct, Your Honor.

The Court: —under the plan. All right. I understand your stipulation.

Q. Now,——

Mr. Hudson: May it please the Court, I think we have agreed on the fact that on March 3, 1953, the plaintiff filed with the Director of Internal Revenue for Georgia, their claim for a refund.

The Court: That is admitted in the pleadings.

Mr. Hudson: Is that right?

Mr. Pomeroy: Yes. It is all admitted in the pleadings.

Mr. Hudson: You may take the witness.

Mr. Pomeroy: I have just two questions I would like to ask you, Mr. Haynes.

[fol. 12] Cross-examination.

By Mr. Pomeroy:

Q. The first question is: Do you recall your weekly rate of pay in 1949?

A. I am sorry, sir, I do not recall it.

Q. All right. Do you recall how often you were paid in 1949?

A. Yes, sir, bi-weekly, every other week.

Q. And were you paid by check or in cash?

A. By check.

Mr. Pomeroy: I have no further questions.

Redirect examination.

By Mr. Hudson:

Q. Were you working, as we laymen call it, for the Southern Bell Telephone & Telegraph Company during the time that this, these sums of money were paid to you?

A. No, sir, I was not performing any work.

Q. For the Company?

A. That is right.

Mr. Pomeroy: No further questions.

The Court: You may go down.

Mr. Hudson: Come away.

(Whereupon the witness was excused from the stand.)

The Court: Anything further from the plaintiff?

[fol. 13] Mr. Hudson: We rest for the present, Your Honor.

The Court: All right.

Mr. Hudson: I believe the plan is offered in evidence.

The Court: Proceed for the Government.

MR. R. V. DAVIS, having been sworn, testified as follows:

Direct examination.

By Mr. Pomeroy:

Q. Will you state your name, address and occupation, please?

A. R. V. Davis. Office is in the Hurt Building, and I am General Supervisor of Employee Benefits of the Southern Bell Telephone Company.

Q. And your office is here in Atlanta?

A. In Atlanta, yes, sir.

Q. How long have you been Secretary of the Employees Benefit Committee?

A. Since December, 1946.

Q. And what was your occupation prior to that time?

A. I was General Personnel Supervisor.

Q. And how long have you been with the Telephone Company?

A. Between thirty-eight and thirty-nine years.

Q. Can you describe very briefly the nature of your [fol. 14] functions as Secretary of the Employees Benefit Committee?

A. Well, I am responsible for the administration, the office administration and general supervision of the operation of the Plan of Employees Pensions, Disability Benefits and Death Benefits.

Q. Can you state how many members there are of the Employees Benefit Committee?

A. Five regular members and two alternates.

Q. And who appoints these members?

A. The Board of Directors of the Company.

Q. Will you state to whom the Employees Benefit Committee is responsible?

A. They are responsible primarily, to the Board, and in certain specified areas to the President of the Company.

Q. Can you state again, briefly, the names and occupations of the various Committee Members? Now, I would like to relate this to 1944, if possible, if you can recall the members at that time.

A. You have a copy of the Annual Report, or the Annual Report of the Committee. If I could refer to that, please?

Q. Yes, sir.

Mr. Pomeroy: I will have this marked for identification purposes as Government Exhibit #1.

The Clerk: U. S. Exhibit #1 is the Southern Bell—Southern Telephone News, April 1, 1950.

[fol. 15] (Above marked for identification only as U. S. Exhibit #1.)

Q. Mr. Davis, I hand you what has been marked for identification purposes as Government Exhibit #1, and ask you to identify it, please?

A. This is a copy of the Southern Telephone News of April 1, 1950.

Q. And is that published by the Telephone Company?

A. Published by the Telephone Company, yes, sir.

Q. And I invite your attention to Page 18 of Exhibit #1; and ask if you will identify the subject matter of Page 18?

A. On Page 18 is shown a report of the Employees Benefit Committee to the employees of the Southern Bell Telephone Company, as provided for in the plan.

Q. Now, with Page 18 of Exhibit #1 before you, will you answer then the question—who were the Committee Members in 1949?

A. The Chairman of the Committee was Mr. G. D. Garner—do you want——

Q. Will you state his occupation with the Company?

A. He was Vice-President, Personnel. He has since retired. Mr. J. A. Gantt, who at the time was General Traffic Manager of the Company. Mr. F. M. Malone, who at the time was General Commercial Manager. Mr. H. R. Stone, who at the time and is now Comptroller of the Company. He is now Vice-President—I am not certain whether he was [fol. 16] Vice-President at that time or not, but he was Comptroller. Mr. W. A. Thompson, who at the time was General Plant Manager. They are the five members.

Q. Then were these Committee Members at that time, then, heads of the various departments of the Company?

A. Yes, they were.

Q. Approximately how much time in a given week do the Committee Members spend on Committee business?

A. It would be difficult to express that in terms of a week. We have a monthly meeting of the full Committee, Mr.

Pomeroy, which takes up one morning, from nine thirty until about twelve thirty. That is three hours. And then there is incidental time between the regular meetings, either with special meetings or conferences on benefit matters.

Q. Would it be a correct statement to say the Committee members do not spend in excess of three hours a week on Committee affairs?

A. I think that would be a reasonable statement, yes, sir.

Q. And it is a correct statement that the majority of their time is devoted to other company or corporate affairs?

A. That is correct, yes, sir.

Mr. Pomeroy: At this time I would like to introduce into evidence Page 18 of Government Exhibit #1.

The Court: Is there objection?

[fol. 17] Mr. Hudson: There is no objection, may it please Your Honor, to the Page 18—that is the one you showed me there a moment ago?

Mr. Pomeroy: That is correct.

Mr. Hudson: But may it please the Court, in the interest of time, and in the interest of cost in the event there should be an appeal, I don't think that the magazine itself would be admissible.

Mr. Pomeroy: Well, we agreed to that and I have just mentioned that I would like to introduce Page 18. I propose to rip out Page 18, if there is no objection, and introduce only Page 18.

Mr. Hudson: No. That is one part of the page there. Something on the back.

Mr. Pomeroy: Well, there is, yes, but——

Mr. Hudson: But you are not tendering what is on the reverse side of the page.

The Court: Well, there is only one side of the page that is numbered 18.

Mr. Pomeroy: Yes, sir, that is correct.

The Court: That is the side you are introducing?

Mr. Pomeroy: Yes, sir.

Mr. Hudson: There is no objection to that.

The Court: It is admitted in evidence.

The Clerk: That becomes U. S. Exhibit #1.

(Page 18 referred to above received in evidence as U. S. Exhibit #1.)

[fol. 18] Q. Let me ask you, Mr. Davis, again briefly, what does the Committee do?

A. The Committee is responsible for the entire administration of the plan, and they approve, ratify the actions of the State Benefit Committees, and of myself and my office.

Q. Now, for the purpose of clarification can you describe briefly the organization of these State Benefit Committees and their relationship to the Committee of which you are Secretary?

A. Yes, sir. We operate in nine states, and in each of those states there is a State Benefit Committee comprised of six members who are appointed with the sanction of the Board of Directors, by the Employees Benefit Committee, which is commonly termed the "General Committee."

Q. That would be the Committee of which you are Secretary?

A. That is correct, yes, sir.

Q. And are the Committee members of these various State Committees persons similar in nature to the Committee members of the Parent Committee?

A. That is correct. They are the State Department Heads in their respective states.

Q. They are the heads of the various operating departments of the company in that state, is that correct?

A. That is correct, yes, sir. Now, that is the fact as to their positions in the present committees, though the responsibility of the General Committee for appointing [fol. 19] members of the State Committees is not limited to any particular title or job.

Q. Are sickness disability benefits ever paid before approval by the Committee? When I speak of the "Committee," I speak of the Committee of which you are Secretary.

A. Yes. The Committee of which I am Secretary, the Employees Benefit Committee has, by authority of the Board, given to the State Benefit Committees, and through them to the Secretary of the State Benefit Committee, the authority to pay sickness disability benefits prior to ratification by the General Committee, but with the limitation that the action of the State Committee is not final until it is ratified by the General Committee.

Q. When you say——

A. That, incidentally, is done in the interest of time, to avoid the necessity of the employee being without his sickness pay,——

Q. Now, when you say——

A. —until they come in.

Q. —The approval is subject, is not final and is subject to approval by the Parent Committee——

A. Subject to ratification.

Q. What would happen if the State Committee did authorize payments and the Parent Committee then did not approve such payments?

A. The payments would certainly stop, and might be recovered.

[fol. 20] Q. How would they be recovered? Do you know? Has this ever happened?

A. No. The recovery has not occurred, no. There have been cases in which the General Committee did not ratify the benefits, and the benefits then were stopped.

Q. Let me ask you, Mr. Davis, when approval is given by the Committee of which you are Secretary, is it given for the full amount of benefits to which the employee is entitled under the plan?

A. It is. Yes, it is. The authority, the approval is given and is ratified for the period during which the employee will be entitled to benefits, unless there is prior recovery and the authorization specifies that the benefits are approved during disability not to extend beyond a certain specified date; as covered in the plan.

Q. And by "prior recovery" you mean prior returns because of the te mination of illness?

A. Yes. Prior recovery, or death, or some circumstances which would terminate the benefits otherwise; yes.

Q. Have persons other than employees of the company ever been covered under the plan?

A. No, sir.

Q. Do the employees make contributions for the benefits received under the plan?

A. No, sir.

Mr. Hudson: Now, may it please the Court, just as the question was framed, put and answered, we object to that [fol. 21] as a conclusion, in the first place, on the part of the witness; in the second place, it is an opinion. Now——

The Court: What do you say to that? I understand your objection, you needn't argue your objection. What do you say about that?

Mr. Pomeroy: Well, I say it is simply, it seems to me, a fact, whether contributions are or are not made, and the witness, I believe——

The Court: Well, it is Mr. Hudson's position, possibly, that the contribution is in services, and that this is a part of a general plan,——

Mr. Pomeroy: Yes, sir.

The Court: —so it, you can ask the witness, and I assume that it what you are undertaking to prove, whether there is any contribution that is identified as a contribution for that particular service.

Mr. Pomeroy: What I had in mind, Your Honor, is that if there is some ambiguity in either the question or the answer, I thought it could be brought out on cross examination. I will be glad to rephrase the question if it is misleading in any way.

The Court: I believe if you would rephrase the question it would probably clarify it.

Mr. Pomeroy: All right. I will.

Q. Let me ask you, Mr. Davis, did the employees make any contributions in the way of cash or other assets of value for the benefits received under the plan?

A. No, sir, not to my knowledge.

[fol. 22] Q. Are employees of the company ever given their regular salary during the first week of absence on account of sickness?

A. Yes. Under certain circumstances their pay is continued on a departmental basis, not under the plan, during the first seven days of absence due to sickness.

Q. Do employees who have worked for less than two years with the company ever receive benefits under the plan?

A. Not under the plan.

Q. But they do receive benefits, is that correct?

A. It is possible that they might in unusual circumstances be paid sums, and what we would term "other benefits" not under the plan.

Q. Would the Committee approve such "other benefits?"

A. That's right. They would have to.

Q. And are there other benefits authorized by the Committee that are paid in excess of those provided for in the plan?

A. There could be, yes, sir.

Q. Now, those are approved by the Committee, is that correct?

A. That is correct, yes, sir.

Q. Are these supplemental benefits sometimes approved in needy cases? Is that——

A. That would generally be the type of case in which [fol. 23] something other, something outside over and above the plan would be paid, yes, sir.

Q. Do you recall a situation where a sick employee failed to follow the Committee's advice and was deprived of benefits under the plan for that reason?

A. I do not recall a case in which the employee benefits were denied due to failure to follow medical advice. There have been cases which I recall in which the employee failed to do other things. For instance, have an examination that the Committee asked for, or went away from home without getting permission, and which benefits have been stopped.

Q. Does the company maintain a fund from which the sickness disability benefit payments are made?

A. No, sir. They are paid as an operating expense, and classified to a particular classification as set out in the accounting instructions.

Q. Is it true that at one time there was a fund?

A. That is correct.

Q. And when did that fund exist, approximately?

A. It existed from 1913 until, I believe, 1928 or thereabouts.

Q. Is there an independent trust or association which administers the sickness disability benefits provisions of the plan?

A. There is no independent trust. I am not sure what you would mean.

Q. Well, is there an association——

[fol. 24] A. By an "association"—there is a benefit committee which——

Q. I mean, not connected with the company?

A. Other than the benefit committee there is none.

Q. Do you know if the company sets up a book reserve for sickness disability benefit payments?

A. They do not, as far as I know.

Q. Do you know if there is an insurance reserve set up for sickness disability benefit payments?

A. Not as I know of.

Q. Are the sickness disability benefits charged to operating expenses of the company?

A. Ultimately, yes, sir. They are identified as sickness disability benefits on the books, and are a charge to operating expenses, yes, sir.

Q. Now, are all employes of the company, except those who have worked for less than two years, covered by the plan?

A. By the sickness benefit provisions of the plan, they are, yes, sir.

Q. And does this include all executives up to and including the President of the company?

A. Yes, sir.

Q. Were sickness disability benefits provided for in the plan in 1913 when it was adopted?

A. Yes, they were.

Q. Let me ask you, Mr. Davis, if an employee re- [fol. 25] ceives sickness disability benefits payments under the plan, and then returns to work and within two weeks of his return to work he becomes sick again, let's say in the course of the day, before the day is completed——

A. Umm humm.

Q. —does the employee receive any sickness disability benefit for that day when he does not work the entire day?

A. Will you repeat that, please?

Q. Will the reporter read back the question, please? (Whereupon the question is read back.)

A. No, sir. He would be paid on the payroll for that part of the day, if he had reported and started to work on that day.

Q. When an employee retires and is entitled to a pension under the plan, is such a pension paid from a trust fund?

A. If it is a service pension, yes. If it is a disability pension it is paid and charged to operating expenses.

Q. And are there trustees of this pension fund?

A. The pension trust fund, which is set aside for the payment of service pensions only, is trusteed by the Bankers Trust Company, yes sir.

The Court: What is the relevance of that line of examination in this case?

Mr. Pomeroy: If it please the Court, I am trying to show that funds have been set up from which payments have been made for different types of benefits under the [fol. 26] plan, and I am trying to distinguish the particular sickness disability benefits here in controversy from these other payments.

The Court: All right.

Q. Are the company's contributions to the funds, which you have just described, determined on an actuarial basis?

A. Yes, they are.

Q. And does the company make any contributions to a trust, insofar as the sickness disability benefits are concerned?

A. There is no trust as far as the sickness benefits are concerned.

Q. Has the company, insofar as you can recall, ever been sued in court for sickness disability benefits under the plan?

A. Not that I can recall.

Q. Are sickness—I have already asked you that.

A. Claims have been made but I don't recall any case in which there has actually been a suit in court.

Q. Approximately what percentage of the payroll comprises sickness disability benefits?

A. I believe about two per cent of the payroll is charged to, or an equivalent of about two per cent of the payroll is charged to benefits. I am sorry I do not have a figure as to the sickness benefits, but I would say between one and two per cent.

Q. And this would include benefits paid under the plan, and benefits in the nature of, paid during the first [fol. 27] week, for example, of an employee's illness, is that correct?

A. Yes.

Q. Umm humm. Did the Committee, does the Committee, or has it ever made loans to employees?

A. Yes.

Mr. Hudson: Your Honor, I would like to interpose an objection to whether the company, through its Committee, ever made loans to employees, as being immaterial and irrelevant, shedding no light——

The Court: I don't see the materiality of it. I may not——

Mr. Pomeroy: May it please the Court, I am trying to give a general picture of what the employees benefit Committee does. That is, that it is responsible in general for the welfare of the employees. It performs other functions in addition to the payment of disability benefits. I am trying to show that it is an executive arm of the corporation which, as we contend, in a case of the sickness disability benefits is continuing regular compensation to employees.

The Court: Well, I don't know just how wide a range the testimony should take in order for you to establish that. Now——

Mr. Pomeroy: I am nearly completed. I would like to say I hoped to make an opening statement, in which I wanted to say that we are trying to make as complete a [Vol. 28] record as possible and give the Court what we consider to be the relevant, material background in this case.

The Court: All right.

Mr. Pomeroy: And I hope to tie all of this together.

The Court: Go ahead.

Mr. Pomeroy: I would like to have marked for identification purposes as Government Exhibit #2, a book called, entitled "Miscellaneous Resolutions, C-6."

The Clerk: You just want #6 benefits?

Mr. Pomeroy: Well, I would like to have the whole book identified as an exhibit, then I propose——

The Clerk: If you are going to introduce just one part——

Mr. Pomeroy: I am not going to introduce the entire book.

The Clerk: U. S. Exhibit #2, Miscellaneous Resolutions.

(Above book marked for identification only as U. S. Exhibit #2.)

Q. Mr. Davis, I am going to hand you what has been marked for identification purposes as Government Exhibit #2, and ask you to identify it, please?

A. This is a loose-leaf book out of my bookcase at the office, in which are filed miscellaneous resolutions [fol. 29] of the Board of Directors which relate to matters under the responsibility of the Employees Benefit Committee.

Q. I would like you to turn to a resolution approved on September 23, 1935, and ask you to identify that, please.

The Court: September 23, when?

Mr. Pomeroy: 1935.

Q. Just briefly state what it is.

A. This is a resolution approved by the Board of Directors on September 23, 1935, authorizing the Employees Benefit Committee where, in their opinion——

Q. Just briefly. I think it does speak for itself.

A. —to bridge, as we term it, the service of an employee whose service was previously broken.

Mr. Pomeroy: The Government would like to introduce at this time, as Government's Exhibit #3, this resolution of September 23, 1935, and we propose, with leave of the Court, to have this resolution, as the two following, typewritten and have typewritten copies substituted in lieu of this cumbersome book, and we believe that is agreeable to the opposing counsel.

Mr. Hudson: We might state—we submit, may it please the Court, that insofar as anything in this particular resolution, that it throws no light on the plan as it was in effect in 1949, and, as it affects this claim, would be immaterial and irrelevant. Now, I haven't had an opportunity to read and digest this resolution, but the part of it that I heard read, it occurs to me, Your Honor, as to be [fol. 30] immaterial and irrelevant, and something that happened before the year 1949, when this claim——

The Court: Well, I will reserve my ruling on the objections, and I will admit the resolution for the present and we will see. I understand it is the position of the Government that this overall plan that the sick, so-called sick benefits, is merely one part of an overall plan in which the employee is generally compensated for his service, and that it is not, therefore, insurance within the meaning of the exception clause of the Act. As it relates to that I will

allow it in evidence so as to show what the overall plan was.

The Clerk: May I mark it, please?

Mr. Pomefoy: Yes. I am going to have two more. Do you want to do it all at one time?

The Clerk: Yes, let me have it. I will mark it.

Mr. Pomeroy: It is our understanding, I believe and the Court I believe has agreed to this, that we are going to substitute typewritten copies.

The Court: It is satisfactory to substitute typewritten copies?

Mr. Hudson: Absolutely. The Court, of course, will note our exception to it.

The Court: Yes, sir, the exception is noted.

The Clerk: This is U. S. Exhibit #3, being Resolution approved September 23, 1935.

(Above Resolution marked for identification only as U. S. Exhibit #3.)

[fol. 31] The Clerk: I believe that is the one that is admitted?

The Court: It is admitted subject to the objection that has been made. Objection will be ruled on.

(U. S. Exhibit #3 received in evidence.)

The Clerk: No. 4 is an excerpt from the Minutes of Meeting of Board, June 23, 1925?

Mr. Pomeroy: Yes, that is correct, June 23, 1935.

The Court: That 1935?

Mr. Pomeroy: 1925, Your Honor.

The Court: 1925.

The Clerk: That is U. S. Exhibit #4.

(Above resolution marked for identification only as U. S. Exhibit #4.)

Mr. Hudson: Your Honor, we have not had time to look that over, formulate objections. We'll appreciate the Court giving us time to do that.

The Court: Yes, sir. Right now.

Mr. Pomeroy: I will say I did present this to Mr. Hudson this morning. He has not had time to——

The Court: All right, let Mr. Hudson see it right now, and register any objection he wishes to register.

Mr. Pomeroy: May I continue with my questions on another line and come back to this?

[fol. 32] The Court: No, sir, because he will need to follow you, and he will not have an opportunity. We will just suspend here until he can read this.

The Clerk: U. S. Exhibit #5 being Resolution of the Board of Directors in meeting of April 24, 1944.

(Above Resolution marked for identification only as U. S. Exhibit #5.)

Mr. Hudson: As to——

The Clerk: Call them by exhibit number.

Mr. Hudson: Beg pardon?

The Clerk: The Exhibit Number is on the top.

Mr. Hudson: Exhibit #4, may it please the Court, so far as this resolution relates to temporary relief—that is Paragraph Two of the Resolution—"Temporary relief in cases of sickness or death of employees retired on pension or of accident to them . . ."—insofar as Paragraph Three of this Exhibit relates to loans or salary advances to active employees—plaintiff in the case objects to those two paragraphs as immaterial and irrelevant, and asks the Court to disallow them.

As to the formal parts of the resolution; and as to Paragraph One, with reference to relief measures, plaintiff has no objection. The objection goes to Paragraphs Two and Three of the Exhibit #4.

The Court: All right, the objection will be overruled. It is allowed in evidence.

[fol. 33] (U. S. Exhibit #4 received in evidence.)

Mr. Hudson: As to Exhibit #5, may it please Your Honor, we only object to Paragraph Number Two, "Death Cases. If the employee or pensioner is survived by any of the beneficiaries described in Section Seven . . ."—as being immaterial and irrelevant. The question of relief or compensation in death cases is immaterial and irrelevant to the issues involved in this case.

The Court: Objection overruled. It is admitted in evidence.

(U. S. Exhibit #5 received in evidence.)

The Clerk: That is Exhibits #3, #4, and #5.

Mr. Hudson: Your Honor, the old rule required attorneys to call on the Court to note an exception.

The Court: That is not necessary now. However, the exceptions as to all objections, and rulings that are adverse to the objections made, exceptions are noted and allowed.

Mr. Pomeroy: I have one or two additional questions in relation to Government Exhibit #2 for identification purposes.

Q. I direct your attention to Government Exhibit #4, which is the Resolution of June 23, 1925, and ask you simply if that Resolution is still in effect, and still governs the actions of the Committee?

A. Yes, it is still in effect.

[fol. 34] Q. And one final question. Is an employee of the Telephone Company required to take a physical examination in order to qualify for benefits under the plan when he begins work, or when he first becomes eligible for benefits under the plan?

A. Not necessarily.

Q. Does he have to submit an application for, in order to be covered by the plan, or in order to be eligible to receive benefits under the plan?

A. No.

Mr. Pomeroy: I have no further questions, Your Honor.

Mr. Hudson: Your Honor give me just a minute?

The Court: Yes, sir.

Cross-examination.

By Mr. Hudson:

Q. Mr. Davis, will you explain to the Court what is the difference between a service pension and any other pension that an employee might receive under this plan?

A. Yes, sir. By reference to the plan it will be seen that there are three types of circumstances under which an employee might be eligible to what we term a "Service Pension." An employee who retires at age, a man at age sixty or longer, more, who has, or a woman at age fifty-five or older, who has twenty years or more of service; an em-

ployee who retires, a man at age fifty-five to sixty, a woman fifty to fifty-five, who has twenty-five years of service; or [fol. 35] an employee who retires, regardless of age, after having had thirty years of service, is eligible upon retirement to a service pension.

An employee who does not qualify for service pension but who has fifteen years or more service, and who becomes totally disabled due to sickness or off the job accident, is entitled to what we call a "Disability Pension." The Disability Pension remains in effect during the period of disability. The service pension remains in effect during life.

Mr. Hudson: That is all, Your Honor.

Mr. Pomeroy: I have no further questions, Your Honor.

The Court: You may go down, sir.

(Whereupon the witness was excused from the stand.)

Mr. J. M. Parker, having been sworn, testified as follows:

Direct examination.

By Mr. Pomeroy:

Q. Will you state your name, address and occupation, please?

A. J. M. Parker. I am Division Disbursement Accountant with the Telephone Company here in Atlanta for the State of Georgia. My office is at 800 Peachtree, here in Atlanta.

Q. And do you have responsibility for and familiarity with the payroll records of the Southern Bell Telephone & Telegraph Company for this area?

A. That is correct. My office pays, handles the pay- [fol. 36] rolls for our employees located in Georgia, other than the general office employees.

Q. And are you familiar with the payroll records of the plaintiff in this case, Mr. Haynes, for the year 1949?

A. I am.

Q. Did you bring copies of those payroll records with you?

A. I have. I have a photostatic copy of those payroll records.

Q. Well, I will proceed to ask you some questions and if you need the records, will you so state?

A. I will.

Q. And I will hand them to you. My first questions, my first question is: If an employee is paid during a given pay period, both during sickness and during, both during sickness under the plan and while he is at work—in other words, if, during a given pay period, he is off part of the time, does he receive two checks or one check in payment?

A. The employee would normally receive one check, even though it covered payment for time worked as well as payment for sickness disability benefits. However, the check, the stub that is attached to the check, would reflect the breakdown between the two types of payments that are incorporated in the one check.

Q. Now, if, during a given pay period, an employee was, his regular compensation was paid for the first week while he was sick, and during the second week he re- [fol. 37] ceived payments under the plan, would there be a breakdown similar to the one you just mentioned?

A. Between the first week's pay and the——

Q. The first week's pay while he is absent, and the second week's pay while he is absent?

A. The two would not be distinguished.

Q. I see.

Mr. Pomeroy: I would like to have marked for identification purposes as Government's Exhibit #6, which purports to be the Annual Report of the Southern Bell Telephone & Telegraph Company for 1949.

(Above marked for identification only as U. S. Exhibit #6.)

Q. Mr. Parker, I hand what has been marked for identification purposes as Government Exhibit #6, and ask you to identify it, please?

A. This is the Annual Report for the Year of 1949 of the Southern Bell Telephone & Telegraph Company.

Q. I will ask you, please, to turn to the Profit and Loss Statement contained in the latter portion of the Annual Report.

A. It's on Pages 32 and 33.

Q. And ask you where salaries are shown in the profit and loss statement?

A. Salaries and wages would be shown, depending upon the utilization of those wages, either as a capital asset or an expense item.

[fol. 38] Q. Well, I direct your attention to the heading: "General and Miscellaneous Expenses." Are the salary expenses listed under that heading? Are any salary expenses listed under that heading?

A. Yes. The salary expenses would be listed under that heading.

Q. And is it also true that the sickness disability benefit payments are listed under that heading?

A. As a separate item they are, sir.

Q. And is it, it is also true, is it not, Mr. Parker, that pensions are listed under a separate heading?

A. For service pensions, yes, sir.

Q. Now, I ask you, Mr. Parker, with particular attention to the year 1949, and Mr. Haynes in this case, if you know what his weekly salary rate was?

A. I believe that his weekly salary rate during the period that he was on benefits was seventy-five dollars.

Q. And did he receive his regular salary during the year 1949 from time to time, when he was off of work because sick, and had not qualified for benefits under the plan?

A. You mean were there other periods during the year in which he was off sick? I am not certain, sir.

Q. Well, let me hand you then, I believe these are the photostatic copies. I would like not to introduce these into evidence if it can be avoided, just have the witness testify from them. I would like, while he is looking at those, to introduce in evidence Government Exhibit #6, the Annual Report.

[fol. 39] The Court: Is there objection to the Report of 1949?

Mr. Hudson: I haven't seen the report, may it please the Court. I would like, I would appreciate an opportunity to look that over.

The Court: All right.

Mr. Pomeroy: I will rephrase that question.

Q. In relation to Mr. Haynes, and during the year 1949, were payments made to Mr. Haynes while he was absent from work, but before the one week qualification period of absence had transpired?

A. That is correct. There were other payments.

Q. And is it correct that on the payroll records such payments are listed under sickness payments?

A. That is correct.

Q. And is it true that the sickness disability benefits paid under the plan are also listed under sickness payments on the payroll records?

A. That is correct.

Mr. Pomeroy: I have no further questions.

By the Court:

Q. Now, let's see if I understand that testimony. What two types of payments have you just testified about as having been classified in the payments as sickness benefits?

A. No, sir. I have testified that there were two types of payments which are, on our particular payroll records are reflected under our Code SP, and those include the [fol. 40] payments for this first seven days sickness, cases of that nature as well as cases under the benefit plan. Those are coded on that basis under accounting instructions because we do tax them for withholding tax, or had in the year 1949. Both items were similarly subject to withholding tax under our procedure, and therefore both are similarly coded on our payroll records. They are separately identified on other records as between the payments that apply to sickness disability benefits and those sickness payments that are within the first seven days of sickness and beyond the scope of the plan.

Q. What is the provision of your plan for the first seven days of sickness?

A. The first seven days of sickness are not included in the employees plan for disability and accident, only illnesses running, extending beyond the first seven days of absence are covered by the plan.

Q. Is there any way for you to determine from your records now what portion of this twenty-one hundred dol-

lars that was paid to Mr. Haynes was for the first week of his illness?

A. The twenty-one hundred dollars, that, I am not familiar with the entire amount, but we furnished to Mr. Haynes a statement of the amount that he received during 1949 under the plan, and excluded from that were any payments not under the plan the first seven days, so it is my——

Q. Then the payments as here involved, as paid under the plan do not include the first type of payment that you testified about?

A. That is correct, sir.

[fol. 41] Q. All right.

A. There is purely a mechanics difference between the payroll records I was looking at and the claim that Mr. Haynes filed.

Q. All right.

Mr. Hudson: Now, may it please the Court, with reference to tender of this document marked Exhibit #6, it appears to be a 1949 Annual Report. Now this we contend, Your Honor, is utterly immaterial and irrelevant, and there may be some portions of it that bear some relevance. I notice a clip on Page 9. May I inquire, with Your Honor's permission, whether the Page 9 and 10 is tendered or just 9?

Mr. Pomeroy: I don't know who put this clip on here, to tell you the truth. I am tendering the entire Annual Report with its various accounting statements as an exhibit #6, and it seems to me the simplest way to introduce it into evidence is to introduce it in its entirety.—

Mr. Hudson: We object to the exhibit as offered by the Government.

The Court: I think the objection would be good. I do not think that because you may have one or two portions of a volume that may have some relevance, that you can burden the record——

Mr. Pomeroy: All right.

The Court: —by introducing the entire volume. Now, [fol. 42] if you wish to delete from that the relevant portions of it, then I will permit you to offer that later, if you wish, but——

Mr. Pomeroy: Well, I would then like to introduce certain portions of this. I hadn't studied it with that in mind too

carefully. Maybe I ought to wait and take a minute or two to look this over, if I may.

The Court: All right.

Mr. Parker, I have one further question. In connection with the charging of these various payments to expense accounts, the sickness disability benefits and the payments made during the first week of absence are both charged to relief accounts, are they not?

A. No, sir. The payments during the first seven days are charged to whatever account would be appropriate for the work that the man normally did.

Q. Would that be the regular wage or salary account?

A. That would be the regular wage or salary account, that is correct.

Q. And during the second week these amounts are charged to the relief accounts?

A. When they are payable under the benefit plan.

Q. Now, if amounts are paid in excess of those authorized under the terms of the plan, amounts that are, in fact, approved by the Benefits Committee, are those amounts also charged to a relief account?

A. That is correct.

Mr. Pomeroy: I have no further questions, Your Honor.

[fol. 43] The Court: Now, is there any question about the amount for which the plaintiff here sues? Is it the contention of the Government that a part of that amount was his regular wages?

Mr. Pomeroy: No, sir.

The Court: As distinguished from sick benefits?

Mr. Pomeroy: The entire twenty-one hundred dollars, as we understand it, was paid pursuant to the plan.

The Court: Under the plan?

Mr. Pomeroy: It is an all or nothing proposition.

The Court: Very well. I just wanted to be sure of that. All right.

Mr. Pomeroy: I have no further questions, Your Honor.

Cross examination.

By Mr. Hudson:

Q. Mr. Parker, what is your position with the Southern Bell Telephone & Telegraph Company?

A. I am, my title is Division Disbursement Accountant, and I am responsible for the payroll and related work for the State of Georgia.

Q. Now, as such employee of this company, briefly—with Your Honor's permission—without saying that Southern Bell Telephone & Telegraph Company all over—you didn't make this book, did you?

[fol. 44] A. No, sir.

Q. And you did not do the mathematical work, the calculations that are in this book?

A. That is correct.

Q. They came to you from someone connected with the company——

A. Yes, sir.

Q. —did they not? Now, I believe, if I remember your testimony correctly, you stated that the check for, or that a check for Mr. Haynes' salary, as an illustration, and a check for the sick benefit payments, the check of itself and on its face would not show what it was for, was that your testimony?

A. That is correct, sir. The check itself, which is detached and deposited in the bank, would not show it, but the stub attached thereto and retained by the employee, would.

Q. Now, you mean that portion of the check called the stub, that stays with the book?

A. No, sir.

Q. When the check is removed and passed on?

A. I might explain that our payroll check, in being tendered to an employee, comprises two parts. The right hand section is the check itself, with the payee's name and the net amount that he is to get from the, from t at check. To the left is a coupon that the employee retains as his information, which reflects what comprises the wage payments, and the deductions that resulted in the net amount that is the check.

[fol. 45] Q. And would also show the difference between a salary check and a sickness benefit check?

A. The gross amount of wages involved in that check, if part of it were regular wages for working, and part of it were sickness payments of another nature, they would be separately stated, yes, sir.

Q. Now, you have those records, do you not, with reference to Mr. Haynes, showing what was paid to him under the sickness benefits plan during the year 1949? You have the checks, or you have the stubs, or what memorandum do you have that would show that?

The Court: Mr. Hudson, it is stipulated here by the Government that the entire amount that you sue for here was paid to Mr. Haynes under the plan, and that no part of it refers to the regular salary.

Mr. Hudson: Well, with that stipulation, then, I don't see the materiality of this particular testimony at all, and I move the Court to strike this witness' testimony heretofore given with reference to the checks insofar as they relate to Mr. Haynes.

The Court: Objection is overruled.

Mr. Pomeroy: I have no further questions, Your Honor, with one reservation. I would like to get portions of this Annual Report into the record before the witness leaves, in case there is any question as to——

The Court: Well, there is considerable question under the, since Mr. Hudson has questioned this witness about the proper identification. While he had heretofore identified [fol. 46] it as being the Annual Report——

Mr. Pomeroy: Yes, sir.

The Court: —that to make that admissible I believe you would have to bring it under the rule with respect to the records of the company, would you not?

Mr. Pomeroy: Well, it was my understanding, in accordance with our conference before we came in here, that this would be admissible in lieu of bringing the Government's, or the company's records in. This is simply a comparative balance sheet, and a profit and loss statement certified to by a public accountant, It would be——

Mr. Hudson: I am sorry that is my good brother's under-

standing, but Your Honor I don't recall having seen this document, or discussed it.

Mr. Pomeroy: I discussed it with you in the Grand Jury room before we came in. Well, if there is some question about it, I don't see any reason why you would object to this.

The Court: What is the relevance of that?

Mr. Pomeroy: If it please the Court, the breakdown in accounting treatment of these various payments, salary payments, and sickness disability benefit payments——

The Court: Well, what does that illustrate?

Mr. Pomeroy: Well, it shows they were charged to general expenses. It shows they were separated from——

[fol. 47] The Court: Well, you have oral testimony in the record to that effect.

Mr. Pomeroy: They were separated from service pensions.

The Court: All of these were charged up to operating expense.

Mr. Pomeroy: And that service pensions appear under separate account. If you feel that this evidence is adequately presented in the record, I will withdraw my tender of this document.

The Court: I don't follow you all the way. I don't know what you are driving at, so I can't say that I feel it is adequately supported in the record because I really don't know what, I don't see the relevance of it.

Mr. Pomeroy: This is perhaps a more graphic explanation of what the witness has said. I think perhaps what he said will be clearer if the various sections of this profit and loss statement to which he has alluded in the record, are in the record.

The Court: You will introduce that simply for showing the method of the treatment rather than to undertake to show the correctness of the particular figures?

Mr. Pomeroy: Yes, sir. Yes, sir.

The Court: Is there any objection to that, Mr. Hudson?

Mr. Hudson: Hearsay, may it please the Court, in addition.

[fol. 48] The Court: All right. I will give you an opportunity to bring the records in and substantiate it. You may send and get the records and bring it in.

Mr. Pomeroy: I have no further questions, then, of this witness.

Mr. Hudson: No questions. Come down.

The Court: You may go down.

(Whereupon the witness was excused from the stand.)

Mr. J. B. Thornton, Jr., being duly sworn, testified as follows:

Direct examination.

By Mr. Pomeroy:

Q. Will you state your address and occupation, please?

A. I live at 420 Landover Drive, in DeKalb County. My title is General Accountant for Southern Bell.

Q. Are you familiar with the salary paid the employees and officers of the Southern Bell Telephone & Telegraph Company during the year 1949?

A. I am.

Q. Could you state——

A. Some of them, I will say.

Q. Could you state in categories such as ten thousand dollar ranges from the President on down what the various employees made, approximately, just so many employees?

The Court: What is the materiality of that?

[fol. 49] Mr. Pomeroy: I want to show, if it please the Court, that this plan covers salaries up in excess of the amounts that he is going to be stating. I want to show the range of the plan, so to speak. We have had testimony——

The Court: Doesn't the plan itself show the range?

Mr. Pomeroy: It doesn't show the salaries, though.

The Court: Well, how is the salaries material?

Mr. Pomeroy: If, for example, it were to develop that employees were paid in excess, for example, of fifty thousand, that would indicate that if this is held by the Court to be health insurance that an employee could be sick for six months, or a year, either twenty five thousand or fifty

thousand dollars tax free under the plan. That is my purpose.

The Court: Well, would that illustrate any issue in here?

Mr. Pomeroy: I think it illustrates, according to our position, that Congress did not intend benefits paid under plans such as this to be excluded from income.

The Court: It is your contention that Congress intended to limit it to amount?

Mr. Pomeroy: I think that Congress didn't intend benefits paid under a plan such as that to be includable at all.

The Court: Then the amount wouldn't have any effect on it.

[fol. 50] Mr. Pomeroy: Well, except for the fact that the larger amounts would tend to indicate that Congress certainly didn't intend a salary of fifty thousand dollars to be excluded from income——

The Court: You think Congress made no mention as to amount——

Mr. Pomeroy: Yes, sir.

The Court: They said there should not be included in income certain funds.

Mr. Pomeroy: Well, health insurance is the issue, as was stated here.

The Court: Well, you think if it was large insurance they did intend it to be included, if it was small they didn't?

Mr. Pomeroy: No, sir, I think they intended no payments under a plan such as this——

The Court: Then the amount would not be material.

Mr. Pomeroy: All right, then I withdraw the witness.

The Court: All right. I think the question we have here is whether it comes within the exclusion or not, and not the question of amount. I don't think the amount would illustrate it in any way.

Mr. Pomeroy: In order to perfect the record I would like to make a proffer of the testimony that this witness would give.

[fol. 51] The Court: I will withdraw my ruling and allow you to put it in the record.

Mr. Pomeroy: All right. Thank you.

The Court: I will state to you that I am allowing it in the record because you want it in the record as a part of

the record. I do not think it has the effect that you think it has, but I will allow it.

Mr. Pomeroy: Yes, sir, I understand.

Mr. Hudson: We want to offer the objection, Your Honor, that it is immaterial and irrelevant to the issues in this case.

The Court: I am doubtful about it, and I will allow it in evidence and overrule the objection. Go ahead.

Q. Mr. Thornton, I would like to ask you if you can give, in roughly ten thousand dollar categories, the salaries of the higher paid officers and employees of the Telephone Company?

A. That is in 1949?

Q. Yes, sir.

A. I presume you are interested in. At the end of 1949—I will give you the number of employees by brackets——

Q. Yes, sir.

A. —of annual pay. Those having the rate of pay as of December 31, 1949, are, between twenty and thirty thousand —up to thirty thousand dollars, there were four employees. Those with annual rate of pay between thirty and forty [fol. 52] thousand dollars, on that same date there were two. Those with a rate of pay of between sixty and seventy were one. Those, that is a total of seven employees at the end of 1949 who had an annual rate of pay of more than twenty thousand dollars a year.

Q. Now, were there any employees in the category from forty to fifty and fifty to sixty?

A. No. I omitted those because there were no employees in there.

Mr. Pomeroy: I have no further questions.

Mr. Hudson: Now, may it please the Court, may I inquire of the Court whether we must renew our objection as the testimony came?

The Court: Well, you may.

Mr. Hudson: Well, I would like to do that, with Your Honor's permission, on the ground that this testimony just elicited from this witness is immaterial and irrelevant, first. Second, I would like to inquire of the witness—I am just basing this objection on the supposition that he didn't make these figures—that this is a record which came to him from

some employee or employees of the Telephone Company.

The Court: Well, under the federal rule, Mr. Hudson, if these are records kept in the regular course of business, whether he kept them or not, it would be admissible here.

Mr. Hudson: If relevant and material to any issue.

[fol. 53] The Court: Yes, sir. That doesn't affect the question of materiality and relevancy, but it does so far as the records are concerned. He wouldn't be required to keep them himself.

Mr. Hudson: Well, we insist that the evidence is immaterial.

The Court: Well, as I stated before, I am very doubtful as to the relevancy of the testimony, but being in doubt about it I will admit it.

Mr. Hudson: Come down.

Mr. Pomeroy: May the witness be excused, Your Honor? I have no further questions.

The Court: You may.

(Whereupon the witness was excused from the stand.)

Mr. LaFayette Davis, having been sworn, testified as follows:

Direct examination.

By Mr. Pomeroy:

Q. Will you state your name, please?

A. LaFayette Davis.

Q. And your address and occupation?

A. General Agent and Branch Manager for the Provident Life & Accident Insurance Company of Chattanooga, Tennessee. Address, the Atlanta Federal Savings Building.

Q. Here in Atlanta?

A. Yes, sir.

[fol. 54] Q. Can you describe very briefly the general nature of your functions as a General Agent?

A. Well, I manage the affairs of the company with particular regard to the life and accident and health and hospital portions thereof in the State.

Mr. Hudson: We object to this testimony, may it please the Court. That is immaterial and irrelevant, and can shed no light on the issues involved in this case.

The Court: What this man's duties are with the company that he works with——

Mr. Hudson: He don't work with the Telephone Company, my understanding is.

The Court: A man doesn't have to work for the Telephone Company in order to be a competent witness.

Mr. Hudson: That is correct, Your Honor, but how his company manages its business is an item entirely separate from the way the Southern——

The Court: He has not asked him how this company managed their business. He simply asked him what his duties were with his company. That is the question to which you are offering your objections.

Mr. Hudson: That is correct, Your Honor, as being immaterial and irrelevant.

The Court: All right. I don't know what you expect to prove by this witness. You may go ahead.

[fol. 55] Mr. Pomeroy: I will state for the purpose of indicating where we are going, I was going to qualify this witness as an expert and elicit certain answers in regard to the nature of health insurance in general, it's background material.

The Court: All right.

Mr. Pomeroy: That is my purpose.—Let the reporter read the last question and answer.

(Whereupon the question and answer were read.)

Q. Are you an agent licensed by the State of Georgia?

A. Yes, I am.

Q. And what are you licensed to do by the State of Georgia?

A. The performance of the functions of a General Agent in the insurance business.

Q. How long have you been an agent in the general insurance business?

A. To distinguish—a General Agent in the general insurance business is not exactly correct. I am a General Agent——

Q. I understand.

A. —in this particular line of insurance. I have been in this position in Atlanta with this company since 1938.

Q. And before that what, briefly, was your occupation?

A. I was on the road for this company as a home office employee since '35.

[fol. 56] Q. And have you had familiarity with the issuance and sale of health insurance policies?

A. Yes.

Q. How long have you had familiarity and experience with the sale and issuance of health insurance policies?

A. Since 1935.

Q. Roughly, how many accident, or how many health insurance policies have you had occasion to sell or issue since 1935? Do you have any idea?

A. No. That would almost be an impossibility to state.

Q. Are you familiar with the health insurance business in the United States?

A. Yes.

Q. Are you familiar with the business of other insurance companies in general, as to their policies in administration?

A. In general, yes.

Q. Are you familiar with limits, if any, on the total of salaries which is insurable under a health insurance policy?

A. In general I am, yes.

Q. Is there a maximum, percentagewise, of an insured's salary which normally can be insured under a health insurance policy?

A. In general there is no insurance company that I know of that would insure a man's salary up to more [fol. 57] than eighty per cent thereof. As a rule we try to keep it slightly below that, particularly in group insurance.

Q. Now, in group insurance, is there a different limit figure that you can give?

A. As a rule it is slightly lower. We try to keep it—I have to say what we do as my experience, but I think it is general with most companies, would be about two-thirds of the salary.

Q. Let me ask you one further thing, preliminary matter. I want to ask you if you hold any official position with any insurance organization?

A. At this time I am Chairman of the Law and Legislation Committee of Georgia Association of Accident and Health Underwriters.

Q. Now, can you state very briefly what your education and training were?

A. I am a graduate of the University of Georgia.

Q. Can you state, or do you know what the policy is behind the limitation of the maximum amount of the salary which can be insured under a particular health insurance policy?

A. You mean the reason why there is a maximum?

Q. Yes.

A. Yes. Because if one could buy insurance for more than his earned income, there would be a moral hazard in the insured's preferring to collect more by being sick than he would by going to work.

Q. Why is the amount, if you know, set less than a [fol. 58] hundred per cent? Why would the figure be eighty per cent or less?

A. So he would have an incentive to return to work as promptly as possible.

Q. Well, do you know of any health insurance, or have you heard of any where the insuring company reimburses a hundred per cent of the insurance?

Mr. Hudson: Your Honor, I don't want to waive any of my rights to object. I object to that as being utterly immaterial and irrelevant. Now, whether this man knows or does not know something about his insurance company or some other insurance company is immaterial, and we object to it.

The Court: I will allow him to show it. I am very doubtful about the relevancy of this line of testimony but I will allow him to put it in the record. Go ahead.

Q. Will you answer the question, please? Do you want it read back?

A. Yes, please.

(Whereupon the question was read back.)

A. I presume you mean insurers for a hundred per cent of the salary?

Q. Yes.

A. I do not know of that.

Q. If an insured had obtained policies from, let us say, several companies, the total coverage of which was either a hundred per cent or in excess of a hundred per cent of his [fol. 59] salary, would a health insurance company pay in a case of sickness the full amount under the policy, or would there be some pro-ration?

Mr. Hudson: I object to that. We are into the realm of, now of speculation.

The Court: Yes. While they have qualified him as an expert, I think that would necessarily depend upon the terms of your insurance contract.

Mr. Pomeroy: Well, I believe I have qualified this gentleman as an expert,——

The Court: Yes, sir.

Mr. Pomeroy: —in the insurance field. I am now asking him a hypothetical question based upon his experience.

The Court: Well, there is nothing in the record upon which to base the hypothetical question that you have asked him. As I understand it, before you can propound a hypothetical question to an expert witness, it must be upon relevant matters that have been developed upon the trial of the case.

Mr. Pomeroy: Well, as I see it, I have proposed a hypothetical situation where several insurance companies issue health insurance policies to one individual, the total coverage of which exceeds the employee's salary, or is equal to the employee's salary, and I am trying to elicit the answer to whether such, whether the insurance company would pay the full amounts under the policy so that an insured could get either a hundred per cent or in excess of a hundred per cent of the salary.

[fol. 60] The Court: Mr. Pomeroy, that is a matter of the, under the question that you have propounded to this witness——

Mr. Pomeroy: Yes, sir.

The Court: —the terms of the insurance contract issued by the companies would control that very question. This witness couldn't answer possibly, even though he is an expert,——

Mr. Pomeroy: All right.

The Court: As to whether the insurance companies would pay.

Mr. Pomeroy: I was asking him from his general knowledge as to what the custom was in the industry. I will withdraw the question if it is troublesome for that reason.

The Court: I don't think his answer could have any sort of probative value,——

Mr. Pomeroy: All right. I will withdraw it.

The Court: —because your question assumes that these companies issue written contracts——.

Mr. Pomeroy: Yes, sir.

The Court: —and that they have agreed, each have agreed to pay certain losses. Now, if they have provisions in those contracts with respect to other insurance, and so forth, then his answer would be one thing, but they must depend upon the terms of those insurance contracts themselves.

Mr. Pomeroy: All right. Well, let me rephrase the question this way.

[fol. 61] The Court: All right.

Q. Is it customary in the health insurance business to provide a limitation in the health insurance contract whereby an insured cannot receive from all outstanding health insurance policies an amount in excess of his salary?

A. There are some contracts issued with the so-called pro-ration clause therein, but those clauses are never in group insurance contracts, and that condition is presumably taken care of at the time of the purchase of insurance rather than at the time of the claim.

Q. All right. From your familiarity with the health insurance business have you ever seen a health insurance policy, or had knowledge of a health insurance policy where the period of time during which the benefits were paid depended on the length of time that the insured has held a particular job?

Mr. Hudson: We object to that, Your Honor. That is immaterial and irrelevant. What this man knows or what this man has seen has no bearing on the issues in this case.

The Court: Well, I think I see what he is driving at, and I doubt the relevancy, materiality of it, but I am going to

allow him to put it in the record. I don't think it is at all controlling in this case.

Mr. Pomeroy: As I indicated before, I am trying to elicit the background as well as I can.

The Court: Well, you have gotten away from background now, but I am going to let you go ahead.

[fol. 62] Mr. Pomeroy: Well, will the Reporter repeat the question, please?

(Whereupon the question is read back.)

A. No, I have not.

Q. Let me ask you——.

The Court: Now, how far do you intend to go in this field? I am going to have to stop you somewhere.

Mr. Pomeroy: I have one further question, Your Honor, and I think I will be completed.

The Court: All right. Go ahead.

Q. Under what circumstances, if any, are physical examinations required in the health insurance industry before insurance is issued?

A. That, of course, will have to be general because there is, several companies could have different rules, but in group insurance there is no evidence of health required, and on individual policies, most cancellable forms of health insurance policies are issued without examination, while most non-cancellable forms of individual policies require examination.

Q. Does the presence or absence of a physical examination ever depend upon the amount of coverage sought by the particular applicant?

A. It could be, yes.

Q. And would it also possibly depend upon the prior history of the applicant in regard to his health?

[fol. 63] A. If evidence of insurability was required, yes, because that would be the reason for the examination.

Mr. Pomeroy: I have no further question, Your Honor.

Cross examination.

By Mr. Hudson:

Q. Give me the name of the company with which you are presently employed, please?

A. The Provident Life & Accident Insurance Company of Chattanooga, Tennessee.

Q. Now, Mr. Davis, have you had occasion, or have you been called upon to read and examine Plaintiff's Exhibit #1 in the case at bar?

A. I have seen it, sir. I have not read it, nor have I examined it.

Q. Now, where did you see it, please?

A. Mr. Pomeroy showed it to me.

Q. Is that the counsel for the Government?

A. Yes, sir.

Q. When did he show you that plan?

A. Yesterday afternoon.

Q. And he subpoenaed you here to testify in this case?

A. Yes, sir.

Mr. Hudson: Come away.

The Court: Go down, sir.

[fol. 64] (Whereupon the witness was excused from the stand.)

Colloquy Between Court and Counsel

Mr. Pomeroy: This is the Government's last witness, if the Court please. Before the Government rests I have a further exhibit. I believe this will be Government's Exhibit #7, which is a certified copy of a statement by the Insurance Commissioner of Georgia. I would like to offer that as an exhibit at this time.

Mr. Hudson: Plaintiff objects to the Government's Exhibit #7 on the ground, first, that it is hearsay, may it please the Court. Second, that it is immaterial and irrelevant. I have had opportunity to examine this particular exhibit, and it seems to be a statement from one Mr. Zack Cravey with reference to the licensing of the Southern Bell Telephone Company to write insurance, and we object to it in its entirety.

The Court: Do you wish to be heard on that?

Mr. Pomeroy: Yes, sir, Your Honor. My position is that that is apparently properly certified copy of the Commissioner's statement and it should be admissible into evidence under the rules.

The Court: Under what rule?

Mr. Pomeroy: I will have to get the rule number.

The Court: As I understand this statement, this is a statement as to what the records do not contain.

Mr. Pomeroy: Apparently so, yes.

The Court: Yes.

[fol. 65] Mr. Pomeroy: I will invite the Court's attention to Rule 44, and that will be the rule.

The Court: What is it? Read it?

Mr. Pomeroy: Well, it is "Proof of Official Records. Authentication of Copy. Proof of Lack of Record.".

The Court: It is your contention this is Proof of record?

Mr. Pomeroy: Proof of Lack of Records.

The Court: Does that provide that?

Mr. Pomeroy: "A written statement signed by an officer having the custody of an official record or by his deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible ..."

The Court: What do you say to that, Mr. Hudson?

Mr. Hudson: That is, as we say, not material and not relevant. We don't think that complies with the rule. There is no—it has not been shown up to now, as we contend, that Mr.,—that there is anything in this certificate that Mr. Cravey himself couldn't come here and tell the Court if it were material or relevant.

The Court: I will overrule the objection. I will allow the statement.

The Clerk: That is Exhibit #7 admitted.

[fol. 66] (Certificate of Mr. Cravey marked and received in evidence as U. S. Exhibit #7.)

Mr. Pomeroy: If it please the Court, again before the Government rests, we have this one other matter of the Annual Report, and I had hoped that opposing counsel and I could work this out now subject to his objections as to materiality and relevancy. These balance sheets and profit

and loss statement can be admitted into evidence without the necessity of calling the corporation's bookkeeper, custodian of the books here and have him testify what the record shows. I don't think there is any question about the accuracy of the figures in here, but the figures aren't introduced into evidence for their accuracy, they are simply to show accounting treatment of these various expenditures. I think in the interest of saving time and expediting the conclusion of this trial if we could introduce these—I think there are three pages—into evidence it would simplify things a great deal.

Mr. Hudson: May it please the Court, I have no desire in the world to be captious, or to impede the Court in the progress of this trial. I have just been handicapped by not having seen this document and having had time to go over it. Now, for the convenience of the Court—I don't think that the plaintiff will have any other evidence—I don't know what time the Court recesses. I hope the Court does recess——

The Court: It doesn't recess at eleven-thirty.

Mr. Hudson: I hope it does recess once in a while. I will be glad to go over this document.

[fol. 67] The Court: How long will it require you? Fifteen or twenty minutes?

Mr. Hudson: Fifteen or twenty minutes.

The Court: We will take a recess, then, for fifteen minutes, then, Mr. Hardegree.

(Whereupon recess was called at 11:28 A.M. EST)

AFTER RECESS

Mr. Hudson: Let's get the Clerk to identify it. This is——

Mr. Pomeroy: Shall we proceed, Your Honor?

The Court: Yes.

Mr. Pomeroy: I think we have settled this Annual Report business. We have ripped out three pages, totaling six front and back, containing the financial statement of the corporation for the year 1949. Mr. Hudson has agreed that this may be received in lieu of the books and records of the corporation as evidence of what these financial statements

contain, that is, the accounting treatment and not the accuracy of the figures.

Mr. Hudson: Without waiving the objection.

The Court: You object on the grounds it is immaterial and irrelevant?

Mr. Hudson: Immaterial and irrelevant.

The Court: I will overrule the objection and allow the evidence.

[fol. 68] The Clerk: That will be marked Exhibit #6 in lieu of the entire report.

(U. S. Exhibit #6 received in evidence.)

The Court: I want to state, Mr. Hudson, that I have allowed in evidence quite a lot of the matter that I do not, under my present view of the case, think is in any sense material or relevant to the issues as I conceive them to be, and if this matter were being tried to a jury my rulings might have been otherwise, but I realize that this particular question that we have here is comparatively new one, and that the Government ought to be permitted full range of the evidence in order to have their views presented and the Appellate Court to pass upon their contentions, and I have been rather generous in allowing the evidence that I consider to be of questionable relevancy for that reason. I just wanted to explain to you my rulings in the matter.

Mr. Hudson: I appreciate Your Honor's explanation, and I appreciate the Court's position. While I appreciate the amount involved in this particular claim is very small——

The Court: Yes, sir.

Mr. Hudson: —nonetheless Your Honor has already observed, and will observe that this plan here not only involves the Southern Bell Telephone Company, but the American Telegraph & Telephone Company, the Western Electric Company, and goes to their associates.

The Court: Yes, sir.

[fol. 69] Mr. Hudson: I see, and saw from the beginning, the importance of this case although this particular amount——.

The Court: Yes, sir.

Mr. Hudson: —is rather small.

The Court: Yes, it involves——

Mr. Hudson: May I say, Your Honor, that I think this is the first time I have ever tried a case on what I call the spur of the moment, without ever having known my adversary, but it has been a genuine pleasure, may it please the Court, and I say that as complimentary to my good brother who presented this case. The case, as far as I see it now, is practically over. May I go a step further, Your Honor? Some of the documents which have been offered and allowed are being photostated. This young lady will require, necessarily, some time to get this record in condition for the Court to approve. I think that our services to the Court are just about terminated for the time being. I don't know whether my good brother Pomeroy is going to agree with me or not. I am going to ask him to go out and eat with me——.

The Court: Well, do we have any further evidence?

Mr. Pomeroy: The Government has not rested. The only thing that remains are those three resolutions which are being photostated now by the Telephone Representative, which will be in the Clerk's hands this afternoon, and we, of course, have agreed that these copies may be introduced in lieu of that manual of the section.

[fol. 70] The Court: Now, they have been allowed in evidence and the record is completed?

Mr. Hudson: That is my recollection.

The Court: Now, I have agreed that the photostats, photostatic copies be substituted for the originals, but that doesn't affect the——

Mr. Pomeroy: Yes, sir, I understand. I just wanted to remind the Court again of that.

The Court: Now, is there anything further?

Mr. Pomeroy: No, sir. The Government rests.

The Court: Anything further for the plaintiff?

Mr. Hudson: The plaintiff rested.

The Court: All right. Now the evidence is closed. You gentlemen want to argue the case?

Mr. Pomeroy: In view of the fact I didn't make any opening statement, I would like to make some brief remarks.

The Court: Very well. Plaintiff has the opening and conclusion.

Mr. Hudson: I will waive the opening argument, may it please the Court.

The Court: All right. Proceed for the Government.

(Whereupon Mr. Pomeroy argued the case to the Court, Mr. Hudson stating he would make his argument in the brief which it was agreed and would be submitted by both parties.)

[fol. 71] Reporter's Certificate to foregoing transcript omitted in printing.

IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Jan. 29, 1955

Plaintiffs, invoking the jurisdiction of this Court under the provisions of 28 U. S. C. A. Sec. 1346 (a) (1), sue here to recover $318.44 income taxes alleged to have been erroneously assessed and illegally collected from plaintiffs.

Plaintiffs contend that $2100.00 paid to Plaintiff, Gordon P. Haynes by the Southern Bell Telephone and Telegraph Company was sickness benefits and as such was exempt from taxation under Title 26, U. S. C. A., Sec. 22 (b) (5). Plaintiffs contend that their timely claim for a refund was disallowed by the Commissioner of Internal Revenue and that they were so notified on June 2, 1954.

[fol. 72] Defendant denies that during 1949 plaintiffs paid to Marion H. Allen, Collector of Internal Revenue for Georgia, by means of withholding tax, $318.44 representing income tax on the sum of $2100.00 paid to plaintiff, Gordon P. Haynes, as sickness disability benefits for the year 1949 by the Southern Bell Telephone and Telegraph Company, but admits that plaintiffs paid $723.84 in income tax liability for the year 1949.

Defendant admits that plaintiffs filed a claim for refund and that the same has been disallowed by the Commissioner of Internal Revenue and that plaintiffs have been so notified, but denies that said tax was erroneously assessed or illegally collected.

Findings of Fact

The plaintiff, Gordon P. Haynes, in 1949 had been employed by the Southern Bell Telephone and Telegraph Company, hereinafter referred to as "the company," for more than 25 years and in that year he became sick and was paid in sick disability benefits under the Plan hereinafter described, the sum of $2100.00 from which the company withheld the sum of $318.44 for income taxes on such sum and the $318.44 was paid by the Company to the Collector of Internal Revenue. The plaintiffs filed a claim for refund alleging that such amount was improperly withheld and this claim for refund was thereafter rejected by the Commissioner of Internal Revenue and the present action was instituted by plaintiffs to recover the $318.44 and interest.

In 1913 the company inaugurated a "Plan for Employees' Pension, Disability Benefits and Death Benefits" which plan, with amendments, is still in force and effect. [fol. 73] Under this plan the company "undertakes to provide for the payment of definite amounts to its employees when they are disabled by accident or sickness, or when they are retired from service, or, in the event of death, to their dependent relatives." The plan provides, inter alia, for sickness disability benefits to all employees of more than two years service with the company and the payments generally begin upon the eighth day of absence from work, but when an employee has received benefits and is absent on account of illness within two weeks of the termination of benefits, the payments begin as of the first day of absence. The amounts paid and the length of time over which the payments are made are governed under the plan by the length of service of the employee with the company and under such provisions of the plan an employee, such as plaintiff here, who had a term of employment with the company of 25 years, or more, may receive as sickness disability payments full pay for a total period of 52 weeks.

Under the plan sickness disability benefits are not payable during a period of layoff and no employee has a right to such benefits after his discharge. The plan is subject to change and may be terminated, but such termination can

not affect rights to which an employee had become entitled prior to such termination.

The plan is administered by a general committee of five members who are appointed and serve during the pleasure of the board of directors of the company and the committee is responsible to the board and the president of the company. The members of such committee are appointed from the operating heads of the various departments of the [fol. 74] company and the majority of their time is devoted to company affairs and not over three hours a week is devoted by the members of the committee to committee work.

All employees, regardless of his or her salary, except those who have worked less than two years with the company, are covered by the plan and they are not required to take a physical examination or to make application in order to receive benefits under the plan. The plan only covers employees of the company and no contribution of cash or other thing of value is required or made by employees in order to be covered by the plan and to receive benefits thereunder.

Under the plan employees receive their regular pay during the first week of absence on account of illness and subsequent weeks are paid under the plan, and all such payments, including payments for the first week, are listed on the company's records as sickness benefits. In case of absence of an employee for sickness, the sickness disability payments to such employee are authorized by the secretary of the committee subject to later approval or ratification by the committee and the committee is authorized by the board of directors to approve payments to employees in excess of those provided for in the plan, and such payments are made in needy cases. The committee also has authority to and makes loans to employees from time to time and has authority to deviate from the plan in other respects. Since the inception of the plan the company has never been sued for sickness disability benefits thereunder.

The company maintains no fund from which disability payments are made and all of such payments are charged to [fol. 75] operating expenses. There is no trust or association which administers the disability benefits under the

plan and no reserve is set up on the books of the company against which disability payments are charged. There is no insurance reserve, and unlike payments to the pension fund under the plan, the cost of sickness benefits is not determined by contributions on an actuarial basis. Payment to an employee for time actually worked and for sickness benefits in a single biweekly pay period is generally in a single check, and in cases where an employee works part of a day and is entitled to sickness disability benefits for the remainder of the day, the entire amount paid to him for that day is charged to his regular salary account. Approximately 2% of the company's payroll in 1949, the year involved here, comprised sickness disability benefits and a total of $1,700,000.00 was paid as such benefits under the plan in that year.

The company is not licensed by the State of Georgia to engage in the business of health insurance.

Private insurance companies who write health insurance do not usually insure a person for more than 80% of the salary earned by such person, and in group health insurance, the limitation is approximately 2/3 of the salary earned, the reason for this being to provide incentive for the insured to return to work as soon as possible, and it is not the practice of such companies to issue policies where the period of time during which benefits are to be paid depends upon the length of time the person has held a particular job or position.

Conclusions of Law

This Court has jurisdiction of the cause.

[fol. 76] The $2100.00 received by the plaintiff, Gordon P. Haynes, from which the $318.44 income tax was withheld, was paid to him as sick benefits and constituted amounts "received through health insurance . . . as compensation for sickness," within the meaning of Title 26, U. S. C. A., Sec. 22 (b) (5), and the inclusion of such amount in the gross income of plaintiffs was improper.

The view of the defendant that the payments were "additional compensation" or "compensation for past services" does not find support in the record.

The employer becomes the insurer and the benefits are

paid only when the employee is ill—if he is not ill, he does not receive them.

Only the value of the protection may be properly treated as additional compensation or income—not the benefits which depend not upon service, but upon duration of illness.

It was held in Epmeier v. United States, 199 F. 2d 508 (4) (7th Cir.):

> "Where employer for adequate consideration agreed and became liable under agreement to pay, and did pay, sickness benefits to an employee based on a reasonable plan of protection to employees, employee was entitled to benefits of provision of Internal Revenue Code excluding from gross income and exempting from taxation amounts received through health insurance as compensation for sickness, notwithstanding there was no formal contract of insurance."

This question has thus been decided adversely to the contentions of the defendant and it seems that the Com- [fol. 77] missioner of Internal Revenue has refused to follow that holding (See 39 A. B. A. 450), although that opinion seems to this Court to be sound.

The plaintiff is entitled to recover. A judgment in accordance with the findings here made may be presented.

This the 28th day of January, 1955.

/s/ Boyd Sloan, United States District Judge

Filed Jan. 29, 1955.

[fol. 78] IN THE UNITED STATES DISTRICT COURT

JUDGMENT—Feb. 8, 1955

Pursuant to a decision of this Honorable Court under the date of January 29, 1955, on the finding of fact submitted to the Court upon the trial of said case, and further pursuant to the conclusions of law as found by the Court, the Court findings that this Honorable Court has jurisdiction of the cause, and that the amount of $2100.00 received by the plaintiff, Gordon P. Haynes, from which $318.44

was withheld, was paid to him as sick benefits and constituted amounts "received through health insurance . . . as compensation for sickness within the meaning of Title 26 U. S. C. A. Sec. 22 (b) (5), and that it was improper to include such amount in the gross income of plaintiffs.

Therefore, it is ordered, considered and adjudged that the plaintiffs, Gordon P. Haynes and Essie M. Haynes, do have and recover of the defendant, The United States of America, the sum of $318.44 principal, and interest at the rate of 6% per annum for a period of five years, 1950 through 1954 inclusive, in the amount of $95.55, totalling 413.99.

This 8th day of February, 1955.

/s/ Boyd Sloan, United States District Judge

John H. Hudson, Wm. R. Hudson, Counsel for Plaintiffs, 521 Connally Bldg., Atlanta 3, Georgia.

Filed and Entered Feb. 8, 1955.

[fol.] IN UNITED STATES DISTRICT COURT

AMENDED JUDGMENT—Feb. 18, 1955

Upon motion of all the parties hereto, and the parties hereto agreeing,

It is ordered, adjudged and decreed that the judgment entered by this Court on the 8th day of February, 1955, be and the same is, amended by striking the provision therein "and interest at the rate of 6% per annum for a period of five years, 1950 through 1954 inclusive, in the amount of $95.55, totalling $413.99" and inserting in its place "with interest according to law."

This 18th day of February, 1955, *nunc pro tunc* as of February 8, 1955.

This amended judgment agreed and consented to.

/s/ Boyd Sloan, United States District Judge

/s/ John H. Hudson, /s/ William R. Hudson, Attorneys for Plaintiffs.

/s/ James W. Dorsey, United States Attorney; /s/ Slaton

Clemmons, Assistant U. S. Attorney; /s/ Charles D. Read, Jr., Assistant U. S. Attorney, Attorneys for Defendant.

Filed and entered Feb. 18, 1955.

[fol. 80] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed March 29, 1955

Notice is hereby given that the United States of America, defendant above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on February 8, 1955, as amended February 18, 1955.

This 29th day of March, 1955.

James W. Dorsey, United States Attorney; Slaton Clemmons, Assistant United States Attorney; Charles D. Read, Jr., Assistant United States Attorney, Attorneys for Defendant.

Filed in Clerk's Office March 29, 1955.

[fol. 81] IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME—May 5, 1955

Upon consideration of the above and foregoing Motion for Extension of Time, it is ordered that the time for filing the record on appeal and docketing the appeal in the above proceeding be, and the same hereby is, extended for a period of fifty (50) days from and after May 8, 1955.

This 5th day of May, 1955.

/s/ Frank A. Hooper, United States District Judge

Motion omitted.

Filed May 5, 1955.

[fol. 82] IN UNITED STATES DISTRICT COURT

ORDER RE ORIGINAL EXHIBITS—June 21, 1955

It is ordered that all original exhibits be transmitted to the United States Court of Appeals for the Fifth Circuit as a part of the record in the above proceeding, in lieu of copies, because of lack of facilities for copying said exhibits.

This 21st day of June, 1955.

Frank A. Hooper, United States District Judge

Filed in Clerk's Office June 21, 1955.

F. L. Beers, Clerk.

[fol. 83] IN UNITED STATES DISTRICT COURT

DESIGNATION OF RECORD ON APPEAL—Filed June 21, 1955

Pursuant to Rule 75(a) of the Federal Rules of Civil Procedure the defendant-appellant herein, United States of America, hereby designates for inclusion in the record on appeal to the United States Court of Appeals for the Fifth Circuit, taken by notice of appeal filed on March 29, 1955, extension of time for filing the record and docketing the appeal having been granted by the District Court for the Northern District of Georgia to June 27, 1955, the following portions of the record and proceedings in this action:

1. Entire record.

/s/ James W. Dorsey, United States Attorney, Attorney for Defendant.

/s/ Slaton Clemmons, Assistant U. S. Attorney.

Filed June 21, 1955.

[fol. 84] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 84a] PLAINTIFF'S EXHIBIT No. 1

Plan for Employees' Pensions, Disability Benefits and Death Benefits.

Southern Bell Telephone and Telegraph Company

Effective January 1, 1913, with Amendments to and Including the Amendment Effective January 26, 1953.

[fol. 84b] SUMMARY OF PLAN FOR EMPLOYEES'

PENSIONS, DISABILITY BENEFITS AND DEATH BENEFITS

Effective January 1, 1913, with amendments to and including the amendment effective January 26, 1953.

This pamphlet describes the "Plan for Employees' Pensions, Disability Benefits and Death Benefits" of the

Southern Bell Telephone and Telegraph Company

A similar Plan has been adopted by the American Telephone and Telegraph Company, the other Associated Operating Companies of the Bell System, the Western Electric Company, Incorporated, and by certain Companies subsidiary to or affiliated with the aforementioned companies, and agreements for interchange of benefit obligations have been made as provided in Section 9 of the Plan.

A brief summary of benefits to which employees may become entitled is given below. For a complete statement, reference should be made to the Plan. It is contained in pages 5 to 23.

1. Pensions.

(1) Retirement on pension is provided for employees coming under the classes listed below. Employees in Class A may be retired on a service pension either at their own request or with the approval of the Committee. Employees in Classes B and C may be retired on a service pension only with the approval of the Committee.

a) Service Pensions

Class A—Employees whose age is 60 years or more (females 55 or more) and whose term of employment has been 20 years or more.

Class B—Employees whose age is 55 to 59 years (females 50 to 54) and whose term of employment has been 25 years or more.

Class C—Employees whose age is less than 55 years (females less than 50) and whose term of employment has been 30 years or more.

b) Disability Pensions

Class D—Any employee whose term of employment has been 15 years or more and who becomes totally disabled by reason of sickness or accidental injury occurring outside of employment, upon being retired from active service by reason of such disability, shall be granted a disability pension, which shall continue so long as the employee is prevented by disability from resuming active service with the Company: provided however, that, if at retirement the employee is qualified for a service pension, a service pension shall be granted instead of a disability pension.

2) The amount of the annual pension in any of the above cases is 1% of the average annual pay for 10 consecutive years, multiplied by the number of years in the employee's term of employment. Except for disability pensions granted employees with less than 20 years service and pensions granted to "part time" employees, the minimum persion will be $100 per month after age 65 and $75 per month before that age.

Note: Pensions, whether minimum or not, are subject to all applicable provisions of the Plan, including adjustment as provided by Paragraph 28 of Section 8 on account of benefits under the Federal Social Security Act. Thus service pensions are adjusted by one-half the amount of the old-age insurance benefit under the Act as in effect at the time of retirement or August 31, 1952, whichever is later.

[fol. 84c] 2. Accident Disability Benefits.

Total Disability—Full pay 13 weeks (or longer in cases stated below), half pay for remainder of disability.

Partial Disability—For first 13 weeks (or longer in cases stated below), 100% of loss in earning capacity; for re-

mainder of disability, 50% of loss in earning capacity. Period of payments not to exceed six years in all.

For employees with 15 years or more of service, the periods stated as 13 weeks are increased to the full pay periods in the schedule of Sickness Disability Benefits below if the disability originated on or after January 1, 1940.

3. Sickness Disability Benefits.

These benefits commence on the eighth calendar day of absence on account of sickness or accidental injury occurring outside of employment and the sickness disability benefits in such cases originating on and after January 1, 1940 shall be as follows:

a) If term of employment has been 2 to 5 years—full pay 4 weeks; half pay 9 weeks.
b) If term of employment has been 5 to 10 years—full pay 13 weeks; half pay 13 weeks.
c) If term of employment has been 10 to 15 years—full pay 13 weeks; half pay 39 weeks.
d) If term of employment has been 15 to 20 years—full pay 26 weeks; half pay 26 weeks.
e) If term of employment has been 20 to 25 years—full pay 39 weeks; half pay 13 weeks.
f) If term of employment has been 25 years or more—full pay 52 weeks.

Note: These benefits are not provided in the Plan for employees of less than two years' service. In such cases such practice as the Company may establish from time to time will be followed.

4. Death Benefits.

Benefits in case of Death of Active Employee—If the employee leaves a wife who was living with him at the time of his death, a husband who was physically or mentally incapable of self-support and who was actually supported by the employee at the time of her death, or a child under the age of 18 years (or over that age if physically or mentally incapable of self-support) who was actually supported by the employee at the time of death, the amount to be awarded is the maximum specified in the schedules.

In all other cases the amounts to be awarded (within the

limits indicated by the schedules) and the persons to whom the payments shall be made are subject to the discretion of the Benefit Committee.

Beneficiaries are limited to a wife (or husband), dependent children and other dependent relatives of the deceased.

The Death Benefit schedules are:

[fol. 84d] a) Accident Death Benefits

Regardless of the employee's term of employment an Accident Death Benefit not to exceed the amount specified below may be paid in case of death by accident arising out of and in the course of employment:

Three years' pay, not to exceed $10,000; provided, however, that if a greater amount could have been paid under the Sickness Death Benefit schedule below, in a case to which that schedule applies, the maximum of $10,000 is increased to the amount of the Sickness Death Benefit.

In addition to the Accident Death Benefit the necessary expenses of burial, not to exceed $250, will be paid.

b) Sickness Death Benefits.

When the death of an employee with two or more years of service results from sickness or accident occurring outside of employment, a Sickness Death Benefit may be paid not to exceed $250 or the maximum shown below may be paid, whichever is greater:

Employee's Term of Employment	Maximum Sickness Death Benefit
2 but less than 3 years	4 months' wages
3 " " " 4 "	5 " "
4 " " " 5 "	6 " "
5 " " " 6 "	7 " "
6 " " " 7 "	8 " "
7 " " " 8 "	9 " "
8 " " " 9 "	10 " "
9 " " " 10 "	11 " "
10 years or more	12 " "

Benefits in Case of Death of Pensioner—In the discretion of the Committee payments may be made in any case of

death of pensioner to the wife (or husband), dependent children or other dependent relatives of the deceased. The maximum amount of such payments shall not exceed the amount which could have been paid under the Sickness Death Benefit schedule if the pensioner had died on his last day of active service. In the circumstances stated below, benefits of at least the amounts indicated will be paid in all cases.

If the pensioner leaves a wife who was living with him at the time of his death, a husband who was physically or mentally incapable of self-support and who was actually supported by the pensioner at the time of her death, or a child under the age of eighteen years (or over that age if physically or mentally incapable of self-support) who was actually supported by the pensioner at the time of death, a Death Benefit shall be paid as follows:

a) If death occurs within one year after retirement—

The maximum Sickness Death Benefit that could have been paid if the pensioner had died on his last day of active service.

b) If death occurs more than one year after retirement—

Not less than (1) the maximum Sickness Death Benefit specified in (a) above reduced by 10% for [fol. 84c] each full year which has elapsed since retirement, or (2) the amount of the annual pension, whichever is greater.

Manner of Payment—The Death Benefits described above will be paid in monthly amounts equal to the monthly wages or monthly pension at time of death, unless otherwise specified by the Committee, except that the Death Benefit payable to a beneficiary qualified under Section 7, Paragraph 4(a) will be paid in equal monthly installments over a period not exceeding 120 months, if the employee or pensioner has filed a written direction to that effect. Death Benefits will cease upon the death of the beneficiary.

5. Effect of Payments Provided by Law.

Under some circumstances as provided in Section 8, Paragraphs 27 and 28 of the Plan, benefits and pensions are

subject to certain adjustments on account of payments provided by law.

Applications for Benefits

Applications for benefits shall follow the approved instructions of the Company. If such instructions are not readily available, applicants should promptly communicate with the Secretary of the Employees' Benefit Committee, to whom should also be addressed other communications with reference to the Plan.

Retirement Age

By action of the Directors of the Company a rule has been adopted which requires that every officer or other employee becoming 65 years of age shall retire at the end of the month in which that age is reached. Provision is made, however, that by specific action of the Directors the operation of this rule may be delayed from year to year with respect to any employee who is performing such services for the Company that continuation in active employment is deemed for the best interests of the service. Pensions will be voted to those persons retired by the operation of this rule who are eligible to pensions under the Plan at the date of retirement.

Employees' Record of Service

Each employee on entering the service of the Company will be given a copy of this pamphlet and, at that time or at such later time as is the practice of the Company, will be required to furnish for the files of the Committee, on a form supplied for that purpose, information regarding his previous service.

Leave of Absence, Lay-Off and Transfers

Attention is called to the provisions in regard to absences from the service contained in Paragraphs 4, 5 and 6 of Section 8 of the Plan. In order that all employees may be treated fairly, the Company has established routines which must be observed if the continuity of the employee's

service is to be preserved in case of transfer from one Company to another and in case of any absence from the service without pay. Failure on the part of the employee to inform himself of these routines and to observe them may result in loss of credit for previous service. Employees may obtain information regarding the routines from their immediate supervisors or from the Secretary of the Employees' Benefit Committee.

[fol. 84f] PLAN FOR EMPLOYEES' PENSIONS, DISABILITY BENEFITS AND DEATH BENEFITS

Effective January 1, 1913, with amendments to and including the amendment effective January 26, 1953

Section 1. Undertaking.

The Southern Bell Telephone and Telegraph Company undertakes in accordance with these Regulations, to provide for the payment of definite amounts to its employees when they are disabled by accident or sickness or when they are retired from service, or, in the event of death, to their dependent relatives.

Section 2. Definitions.

1) In these Regulations the word "Plan" shall mean the Plan for Employees' Pensions, Disability Benefits and Death Benefits, as set forth in these Regulations.

2) The word "Company" shall mean the Southern Bell Telephone and Telegraph Company, a New York corporation, or its successors.

3) The words "President" and "Board of Directors" or "Board" shall mean the President and Board of Directors respectively of the Company.

4) The word "Committee" shall mean the persons appointed by the Board to administer the Plan.

5) The word "Employees" shall mean those persons who receive a regular and stated compensation from the Company other than a pension or retainer.

6) The expression "term of employment" shall mean period of continuous employment in the service of the Com-

pany, or of the Company, the American Telephone and Telegraph Company, the Associated and Allied Companies with which agreements have been made by the American Company for interchange of benefit obligations and any Bell Company predecessor of any of said companies, or in the service of any one or more of said companies. Service in companies subsidiary to, allied with or predecessors of any one of the aforementioned companies will be considered, in determining "term of employment," as service in such aforementioned company, in all cases authorized by appropriate action on the part of such company.

Section 3. Committee.

1) There shall be a Committee of five (5) appointed by the Board to serve during its pleasure, which Committee shall be called the Employees' Benefit Committee. This Committee shall be charged with the administration of the Plan.

[fol. 84g] 2) The Committee shall have the specific powers elsewhere herein granted to it and shall have such other powers as may be necessary in order to enable it to administer the Plan.

3) It shall determine conclusively for all parties all questions arising in the administration of the Plan.

4) It shall be empowered to authorize disbursements according to these Regulations.

5) It shall adopt such By-Laws and rules of procedure as it may find necessary, subject to the approval of the President.

6) It shall be empowered to employ a Secretary and such other assistants as may be required in the administration of the Plan.

7) The expenses of the Committee in administering the Plan shall be borne by the Company.

Section 4. Pensions.

1) a) All male employees who have reached the age of sixty years and whose term of employment has been twenty or more years and all female employees who have reached the age of fifty-five years and whose term of employment has been twenty or more years shall if

they so request, or may at the discretion of the Committee, be retired from active service and, upon such retirement, shall be granted service pensions.

b) Any employee whose term of employment has been thirty years or more, or any male employee who has reached the age of fifty-five and whose term of employment has been twenty-five or more years, or any female employee who has reached the age of fifty years and whose term of employment has been twenty-five or more years may if the case is approved by the Committee as appropriate for such treatment, be retired from active service and, upon such retirement, shall be granted a service pension.

c) Any employee who has become totally disabled as a result of sickness or of injury, other than by accidental injury arising out of and in the course of employment by the Company, and whose term of employment has been fifteen years or more, shall upon retirement by reason of such disability be granted a pension, which pension is designated a "disability pension"; provided, that if, at the time of such retirement, the employee is qualified for a service pension under subparagraph (a) or (b) above, a service pension shall be granted instead of a disability pension. A disability pension shall continue so long as the employee is prevented by such disability from resuming active service with the Company. If the employee recovers sufficiently to resume active service, the disability pension shall be discontinued and if the employee reenters the service of the Company at that time, the period of absence on disability pension shall be considered as a leave of absence and not as a break in the continuity of the employee's service.

2) The annual pension allowance for each employee retired with a pension on account of age, length of service or disability shall be as follows:

For each year of his term of employment, one percentum (1%) of the average annual pay during the ten [fol. 84h] years next preceding retirement, provided, however, that the Committee may, at its discretion, base

such pension upon the average annual pay of the ten consecutive years of service during which the retired employee was paid the highest rate of wages. The minimum pension for all persons on pensions and who may be retired on pensions under this Plan shall be determined as follows:

a) Except in cases covered by sub-paragraph (b) of this Paragraph 2, the minimum pension shall be One Hundred Dollars ($100) per month for a person who has attained age 65 and Seventy-five Dollars ($75) per month for one who has not yet attained age 65.

b) In the case of pensions granted under Paragraph 1 (c) of this Section to employees of less than 20 years' service, and in cases in which, in the opinion of the Committee, the days or hours constituting the employee's normal service have not been adequate to constitute full-time service during the number of years required to establish elgibility to pension in the class under which the employee is retired, the payment, at the discretion of the Committee, may be less than the applicable minimum amount specified in (a) above, but not less than the amount otherwise payable under the provisions of this Plan.

The pensions herein specified are subject to all applicable provisions of this Plan, including adjustment as provided by Paragraph 28 of Section 8 on account of benefits under the Federal Social Security Act.

3) Pensions shall be payable monthly or at such shorter periods as the Committee may determine in each case.

4) Service-pensions granted to employees shall continue from date of retirement to death of pensioner.

5) Regular employment under a salary with this Company or with any company with which arrangements for interchange of benef obligations, as described in Section 9 of these Regulations, have been made directly or indirectly, shall suspend the right of a retired employee to pension payments during the period he continues in such employment.

6) If an officer of this Company is retired on a service pension and thereafter becomes regularly employed for compensation (except as provided in Paragraph 5 of this Section) the service pension of such retired officer shall be reduced during the term of such employment, or over a period equal to the term of such employment, by the amount of compensation received therefor, unless the Committee with the approval of the Board of Directors shall otherwise determine.

7) The Committee shall furnish at least annually to the President a list of all employees qualified to receive service pensions.

8) The Committee shall notify all employees of their eligibility to retire on service pensions at their own request, as they become eligible.

[fol. 811] 9) In order to meet its obligations to pay service pensions (defined in Paragraphs 1(a) and 1(b) of this Section) granted to take effect under the Plan, the Company, effective January 1, 1927, established a trust fund to be known as the "Pension Fund." It undertakes to maintain this Fund by periodic charges to operating expenses and payments to the Fund in such amounts that when employees are retired or become eligible to retire at their own request under the Plan there will be available in the Pension Fund an amount sufficient to provide for them pensions in the amounts stated in the Plan. The Pension Fund shall be held by a trustee or trustees for service pension purposes only and shall be disbursed as directed by the Company from time to time. In case of termination of the Plan, or in case of revocation or other termination of any trust agreement for service pension purposes executed under the Plan, the Company undertakes to preserve the integrity of the Pension Fund as a trust fund to be applied solely to service pension purposes and to take such action as may be necessary or appropriate to insure the application of the entire fund to such purposes. All service pensions granted to take effect under the Plan shall be paid from the Pension Fund either directly or through the purchase of annuities from an insurance company as the Company may determine.

10) In the event of termination of the Plan, the balance in the Pension Fund shall be applied as follows:

First: To making adequate provision for the payment of the full amounts of the service pensions previously granted to retired employees who are on the pension roll as of the termination date, and for the payment of the full amounts of the service pensions to which employees eligible, as of the termination date, for retirement at their own request have then become entitled, such pensions to start upon the employee's retirement from active service.

Second: To making provision, to the extent permitted by the balance, if any, remaining in the Fund after the foregoing provision shall have been made, for the payment of deferred pensions starting at age sixty-five and continuing until the death of pensioner, computed as hereinafter specified, to all employees who have become eligible, as of the termination date, for retirement on service pension with the approval of the Committee, but not at their own request. If the remaining balance in the Fund shall be insufficient, in the judgment of the Company, to provide the full amount of the computed deferred pensions to employees in this group, the amount of the pension to each employee in the group shall be reduced pro rata.

Third: To making provision, to the extent permitted by the balance, if any, remaining in the Fund after the foregoing provision shall have been made, for the payment of deferred pensions starting at age sixty-five and continuing until the death of pensioner, computed [fol. 84] as hereinafter specified, to all employees who have not yet become eligible as of the termination date for retirement on service pension at their own request or with the approval of the Committee, but who have completed a term of employment of ten or more years on that date and would, if continued in active service until the end of the month during which they would attain age sixty-five, complete a term of employment of twenty years on or before the end of that month. If the remaining balance in the Fund shall be insufficient, in the judgment of the Company, to provide the full

amount of the computed deferred pensions to employees in this group, the amount of the pension to each employee in the group shall be reduced pro rata.

Fourth: In the event that there is any remaining balance in the Pension Fund after making provision deemed adequate for the full amount of the pensions hereinbefore specified as payable in case of termination of the Plan, such balance shall be applied solely for service pension purposes in an equitable manner consistent with the purposes of the Plan.

The deferred pensions specified in this Paragraph 10 as payable to employees who have not yet become eligible as of the termination date for retirement on service pension at their own request, shall be computed, without allowance for any payment upon the death of the employee, in accordance with the provisions of Paragraph 2 of Section 4, subject to the provisions of Paragraphs 27 and 28 of Section 8, except that the term of employment used in the computation shall end as of the date of termination of the Plan, the average annual pay used in the computation shall in every case be the average annual pay for the ten-year period ending on the date of termination of the Plan, and the provisions relating to minimum pensions shall not apply. The payment of such deferred pension shall not be contingent upon the employee's continuing in the service of the Company after the termination of the Plan. In all cases such deferred pensions shall be computed on the basis of the employee's age and term of employment as shown by the Company's records as of the termination date. The Company reserves the right to make provision out of the Pension Fund for any or all pensions specified in this paragraph through the purchase of annuities from an insurance company, or in such other manner as the Company may determine. In the case of all pensions for which provision is made through the purchase of annuities from an insurance company, the delivery of an annuity contract to each employee to whom such pensions are payable shall serve to absolve the Company and the Pension Fund from any further obligation for the payment of such pensions. In the case of all pensions for which provision is not made through the purchase of annuities

from an insurance company, the Company's judgment as to the adequacy of the alternative provision made shall be final. If such alternative provision made, as of the termination date, for deferred pensions to employees not then retired or eligible for retirement at their own re- [fol. 84k] quest should thereafter at any time appear, in the judgment of the Company, to be inadequate or more than sufficient to continue the payment of the amounts previously estimated to be payable the remaining payments on all such pensions shall be adjusted pro rata in accordance with the remaining provision available. In lieu of the deferred pensions starting at age sixty-five as provided for in this paragraph, the Company reserves the right to offer to all or specified groups of employees the option of a reduced pension starting at an earlier age, or such other form of payment as may be consistent with the employee equities involved. The Company's judgment as to the amounts and methods of such alternative payments and the groups to which such options are to be offered shall be final. If any pension payable under the provisions of this paragraph amounts to less than Ten Dollars ($10) per month, the Company reserves the right to pay to the employee upon the date the pension becomes payable the commuted value of such pension in a single lump sum.

11) All Disability Pensions (defined in Paragraph 1(c) of this Section) shall be a charge to the operating expense accounts of the Company when and as paid.

Section 5. Accident Disability Benefits.

1) All employees of the Company shall be qualified to receive payments under these Regulations on account of physical disability to work by reason of accidental injury (not including the accidental injuries specified in Paragraph 13 of Section 8 of these Regulations) arising out of and in the course of employment by the Company. Such payments are hereinafter referred to as Accident Disability Benefits.

2) Accident Disability Benefits shall be as follows:

a) Total Disability—Full pay for any period of total disability during the first thirteen weeks of disabil-

ity, and half pay for any period of total disability after the first thirteen weeks of disability.

b) Partial Disability—For any period of partial disability during the first thirteen weeks of disability, 100% of the difference between full pay at time of injury and wages which, in the judgment of the Committee, the employee is capable of earning; for any period of partial disability after the first thirteen weeks of disability, 50% of difference between full pay at time of injury and wages which, in the judgment of the Committee, employee is capable of earning, provided, however, that no payments for partial disability shall be made after the expiration of six years of disability payments.

c) Beginning January 1, 1940, the thirteen-week periods specified above in sub-paragraphs (a) and (b) shall, for accident disability cases originating on and after said date, be increased to conform to the schedule for full-pay periods set forth in Paragraph 2 of Section 6, if the term of employment is 15 years or more.

"Full pay" and "half pay" for the purposes of this paragraph shall be based on the number of hours per week [fol. 841] commonly regarded as constituting full time service, not including overtime, and shall be computed at the employee's rate of pay at the time the disability began.

3) If after a period of total disability the disability becomes partial or after a period of partial disability the disability becomes total, the amount of the benefits shall be changed accordingly.

4) In ascertaining the period during which Accident Disability Benefits shall be paid, the period of disability shall be taken as commencing upon the first day on which, because of disability, a full day's wages is not paid. Successive periods of disability from accident shall be counted together if from the same accident and separately if from different accidents.

5) Accidental injuries shall be considered as arising out of and in the course of employment only where the injury has resulted solely from accident during and in direct connection with the performance of duties to which the em-

ployee is assigned in the service of the Company, or which he is directed to perform by proper authority, or in voluntarily protecting the Company's property or interests, and there must be a clear and well-established history of the cause and circumstances of injury accidentally inflicted, and they must be sufficient to produce the alleged injury, and there must be satisfactory evidence that such injury renders the employee unable to perform his duty in the service of the Company.

6) In case of accidental injury to any employee arising out of and in the course of employment by the Company resulting in permanent loss of a bodily member or loss of its use, special benefits, in lieu of all other benefits on account of such injury, may be awarded by the Committee, provided, however, that such special benefits shall not exceed the payment hereinafter authorized to be paid in case of death from accidental injury, except by specific authority from the Board.

7) In case of accidental injury to any employee arising out of and in the course of employment by the Company, the necessary expenses for "first aid" shall, on approval of the Committee, be paid by the Company. In addition the Company will pay for necessary surgical treatment, but no employee shall have authority to contract any bills against the Company or the Committee and nothing herein shall be held to mean or imply that the Company will be responsible for such bills as an employee may contract or his surgeon may charge. Bills for surgical treatment must be itemized before they will be considered by the Committee. The decision as to whether in any case surgical treatment was necessary and as to what constitutes surgical treatment shall rest with the Committee. At its discretion the Committee may authorize payment of other expenses necessary for the proper care and treatment of the employee, during such period as the Committee may determine.

8) All Accident Disability Benefits and related expenses shall be a charge to the operating expense accounts of the Company when and as paid.

[fol. 84m] Section 6. Sickness Disability Benefits.

1) All employees of the Company shall, after a term of employment of two years, be qualified to receive payments under these Regulations on account of physical disability to work by reason of sickness. Such payments are hereinafter referred to as Sickness Disability Benefits. Such payments shall terminate when disability ceases and shall in no case extend beyond the periods hereinafter mentioned. For the purposes of these Regulations, sickness shall include injury other than accidental injury arising out of and in the course of employment by the Company.

2) Beginning January 1, 1940, the sickness disability benefits in sickness disability cases originating on and after said date shall be as follows:

a) If term of employment has been 2 to 5 years—full pay 4 weeks; half pay 9 weeks.
b) If term of employment has been 5 to 10 years—full pay 13 weeks; half pay 13 weeks.
c) If term of employment has been 10 to 15 years—full pay 13 weeks; half pay 39 weeks.
d) If term of employment has been 15 to 20 years—full pay 26 weeks; half pay 26 weeks.
e) If term of employment has been 20 to 25 years—full pay 39 weeks; half pay 13 weeks.
f) If term of employment has been 25 years or more—full pay 52 weeks.

"Full pay" and "half pay" for the purposes of this paragraph shall be based on the number of hours per week constituting the employee's normal service under his contract of hiring, not including overtime, and shall be computed at the employee's rate of pay at the time the disability began, provided, however, that the benefits shall at no time exceed the pay which the employee would receive, based on his rate of pay and the general schedule of hours per week constituting a full week's service at the time the disability began.

3) Sickness disability benefits shall begin on the eighth calendar day of absence on account of disability, provided, however, that if an employee has received sickness disability

benefits for any period and is again absent on account of sickness within two weeks after the termination of such period, any benefits on account of such further sickness shall begin on the first day of absence instead of on the eighth day.

4) Successive periods of sickness disability shall be counted together as one period in computing the period during which the employee shall be entitled to benefits, except that any sickness occurring after an employee has been continuously engaged in the performance of duty for thirteen weeks shall be considered as a new sickness and not as part of any disability which preceded such period of thirteen weeks.

[fol 84n] 5) Employees shall not be entitled to receive sickness disability benefits for time for which any wages are paid them by the Company.

6) All Sickness Disability Benefits shall be a charge to the operating expense accounts of the Company when and as paid.

Section 7. Death Benefits.

1) In the event of the death of any employee, occurring on or after January 1, 1946 and resulting from accidental injury arising out of and in the course of employment by the Company, hereinafter referred to as death by accident, there may be paid (and, in the circumstances described in sub-paragraph 4(a) of this Section, there shall be paid) an Accident Death Benefit, the maximum amount of which shall be three years' wages, as defined in Paragraph 8 of this Section, but which shall not exceed Ten Thousand Dollars ($10,000); provided, however, that if the maximum Sickness Death Benefit which could have been paid under the provisions of the next succeeding paragraphs had said employee died from sickness rather than from accidental injury, is in excess of said limit of Ten Thousand Dollars ($10,000), said limit shall be increased to the amount of said maximum Sickness Death Benefit. Payment of the Accident Death Benefit, subject to the conditions imposed in Paragraph 5 of this Section and Paragraphs 27 and 28 of Section 8 and elsewhere in these Regulations, shall be made to the employee's beneficiaries as provided in Paragraph 4 of this

Section. In addition to the Death Benefit the necessary expenses of the burial of the deceased employee, not exceeding Two Hundred and Fifty Dollars ($250), shall be paid.

2) In the event of the death of any employee, occurring on or after January 1, 1930 and resulting from sickness as defined in Paragraph 1 of Section 6 of these Regulations, hereinafter referred to as death by sickness, if the employee's term of employment has been two years or more there may be paid (and, in the circumstances described in sub-paragraph 4(a) of this Section, there shall be paid) a Sickness Death Benefit which shall not be in excess of Two Hundred and Fifty Dollars ($250), or an amount computed according to the following schedule, whichever is greater:

Employee's Term of Employment	Maximum Sickness Death Benefit
2 but less than 3 years	4 months' wages
3 " " " 4 "	5 " "
4 " " " 5 "	6 " "
5 " " " 6 "	7 " "
6 " " " 7 "	8 " "
7 " " " 8 "	9 " "
8 " " " 9 "	10 " "
9 " " " 10 "	11 " "
10 years or more	12 " "

Payment of the Sickness Death Benefit, subject to the conditions imposed in Paragraph 5 of this Section and elsewhere in these Regulations, shall be made to the employee's beneficiaries, as provided in Paragraph 4 of this Section.

[fol. 84o]

3) In the event of the death on or after January 1, 1930 of any person who at the time of death is receiving a pension under these Regulations, the Committee in its discretion, but subject to the following provisions of this Paragraph 3, may authorize a Death Benefit to the wife (or husband) or dependent relatives of the pensioner the total amount of which shall not exceed the maximum amount which could have been paid as a Sickness Death Benefit under the terms of Paragraph 2 of this Section if the pen-

sioner had died on his last day of active service. If such death occurs on or after January 1, 1946, and such pensioner leaves any beneficiary bearing the relationship to the deceased and conforming to the other conditions stated with respect to the death of an employee in sub-paragraph 4(a) of this Section, such Death Benefit shall be paid in accordance with the following:

a) If the pensioner's death occurs within one year following his retirement, the Death Benefit shall be the amount of the maximum Sickness Death Benefit that could have been paid if he had died on his last day of active service.

b) If the pensioner's death occurs more than one year after his retirement, the Death Benefit shall be not less than the amount specified above in sub-paragraph (a) reduced by ten per centum (10%) of such amount for each full year which has elapsed since his retirement, and not less than his annual pension allowance as determined under Paragraph 2 of Section 4, whichever amount is greater.

4). The persons who may be beneficiaries of the Accident or Sickness Death Benefit or of payments on the death of a pensioner hereunder are limited to the wife (or husband) and the dependent children and other dependent relatives of the deceased. The amount to be paid in each case and the beneficiary or beneficiaries who shall receive the same, and the share which each shall receive, shall be determined by the Committee, subject to the following provisions and to the provisions of Paragraphs 3 and 5 of this Section.

a) In the event of death by accident the maximum Accident Death Benefit specified in Paragraph 1 of this Section, or in the event of death by sickness, the maximum Sickness Death Benefit specified in Paragraph 2 of this Section, shall be paid, subject to the provisions of sub-paragraph (c) of this Paragraph 4, to the wife of the deceased employee if living with him at the time of his death; to the husband of the deceased employee, if physically or mentally incapable of self-support and actually supported in whole or in part by

the deceased employee at the time of her death; or to the child or children of the deceased employee under the age of eighteen years (or over that age if physically or mentally incapable of self-support) who were actually supported in whole or in part by the deceased employee at the time of death. If the employee leaves both wife (or husband) and a child or children, as here described, the Committee, in its discretion, may pay the [fol. 84p] Death Benefit to or for any one or more of such possible beneficiaries in such portions as it may determine.

b) If there be no beneficiary of the deceased employee as described above in sub-paragraph (a), then, in the event of death by accident, an Accident Death Benefit in an amount not to exceed the amount specified in Paragraph 1 of this Section, or in the event of death by sickness, a Sickness Death Benefit in an amount not to exceed the amount specified in Paragraph 2 of this Section, may be paid to any other person or persons who may be beneficiaries, as defined in the first sentence of this Paragraph 4, and be receiving or entitled to receive support from the deceased employee at the time of his death.

Subject to the limitations expressed in this sub-paragraph (b) the Committee shall have full authority to determine to whom payments shall be made and the amount of the payments, taking into consideration the degree of dependency and such other facts as it may deem pertinent.

c) If the employee or pensioner shall have made written request and shown good cause therefor, the Committee may pay all or a portion of the Death Benefit to a person or persons included in sub-paragraph (b) above, and reduce, by the amount thus paid, the amount which is payable to the persons included in sub-paragraph (a), provided, in the opinion of the Committee good cause for such action still exists at the time of the employee's or pensioner's death.

d) Upon the death of an employee or pensioner, if there be no beneficiary qualified to receive an award under the provisions of this Section, or if the amount

of such award authorized by the Committee be less than the maximum specified in Paragraph 1, 2 or 3 of this Section, as the case may be, the Committee may authorize such payments as may be required to defray the necessary expenses incident to the death of the employee or pensioner and the disability immediately preceding, together with, in the case of death by sickness, the necessary expenses, not exceeding Two Hundred and Fifty Dollars ($250), of his burial, provided, however, that the aggregate amount so paid shall not exceed the maximum benefits specified in said paragraphs.

5) Unless otherwise specified by the Committee the Death Benefit at the death of an employee or pensioner shall be paid in monthly sums equal to the monthly wages or monthly pension paid at the time of his death. In the discretion of the Committee, however, such sums and times of payments may be varied. Notwithstanding the foregoing and subject to the provisions hereinafter included in this Paragraph 5, an employee or pensioner may file with the Committee a written direction that a death benefit payment which may become payable to a beneficiary qualified under Paragraph 4(a) shall be paid, when such amount has been determined, to said beneficiary in equal monthly installments over a period to be specified in such written direction but not to exceed 120 months and benefits shall be paid in accordance with such direction.

[fol. 84q] In the event of the death of a beneficiary who is receiving or is entitled to receive installment payments under this Section, such payments shall cease. In the discretion of the Committee, however, and within the amounts which the deceased beneficiary would have received if he had survived, the Committee may authorize payments in connection with the disability, death and burial of the deceased beneficiary under conditions similar to those described in sub-paragraph (d) of Paragraph 4 of this Section, or may authorize payments to some other person eligible as a beneficiary of the deceased employee or pensioner under the provisions of Paragraph 4.

Upon the death of an employee or pensioner, the Commit-

tee, without awaiting determination of the beneficiary or beneficiaries, if any, to whom the award will be made, may pay an amount equivalent to the wages, disability benefits or pension which the deceased was receiving, to the end of the payroll period in which the death occurs, and such payment may be made to the wife of the deceased, or to some other suitable person selected by the Committee. Such payment, if made, shall constitute a part of the award. In addition the Committee, in its discretion, may authorize payment, before the final settlement, of a part of the award not exceeding Two Hundred and Fifty Dollars ($250), to meet urgent expenses incident to the death and the immediately preceding disability of the deceased. If any of the persons to whom an award may be payable cannot be found or cannot be conveniently communicated with or are incompetent to authorize use of any part thereof for the burial of the deceased and the payment of necessary expenses incident to his death and preceding disability, the Committee, in its discretion may make such payments, as a part of the award, as in its judgment may be reasonable for the proper burial of the deceased and the payment of necessary expenses incident to his death and disability immediately preceding.

6) A Death Benefit shall not be payable in the case of any person who dies after he has ceased to be an employee of the Company, unless such person became disabled by reason of accident or sickness while an employee and continued disabled, until death, to such a degree as to be unable to engage in any gainful occupation. In such cases a Death Benefit may be paid, in the discretion of the Committee, provided it has been furnished from time to time with such proof of continued disability as it may have required and provided it has been permitted to make, or have made by a physician, such examinations of the disabled person as it has deemed necessary in order to ascertain his condition. The amount of the Death Benefit, if any, shall not exceed the amount which could have been paid if the disabled person had died on the day he ceased to be an employee of the Company.

7) All claims for Death Benefits must be made in writing within one year of the death on which the claim is based. In

case notice in writing of the existence of a wife (or husband), child or other dependent relative of a deceased employee or pensioner shall not be served on the Committee within one year after such employee's or pensioner's death, the Committee shall not be required to recognize any claim made by or in behalf of any such person.

[fol. 84r] 8) "Wages" for the purposes of this Section shall mean wages for full time service (not including overtime), computed at the employee's rate of pay at the date of death; provided, however, that if the employee normally serves the Company on less than a full time basis, benefits in case of death by sickness shall be computed on the basis of the time constituting the employee's normal service under his contract of hiring.

9) All amounts payable under this Section shall be a charge to the operating expense accounts of the Company when and as paid.

Section 8. General Provisions.

1) Neither the action of the Board of Directors in establishing this plan for employees' pensions, disability benefits and death benefits, nor any action hereafter taken by the Board or the Committee shall be construed as giving to any officer, agent or employee a right to be retained in the service of the Company or any right or claim to any pension or other benefit or allowance after discharge from the service of the Company, unless the right to such pension or benefit has accrued prior to such discharge. Except in the event of termination of the Plan, no employee shall have any right to a service pension by reason of service less than that specified in Paragraphs 1(a) and 1(b) of Section 4 of these Regulations, nor any right in the Pension Fund unless a service pension authorized by the Committee under the Plan has not been paid, nor any right against the Company to any benefit under the Plan other than the amount to which the employee has theretofore become entitled and which the Committee has directed be paid to that employee under the Plan. In the event of termination of the Plan, no employee shall have any right in the Pension Fund or against the Company except as herein provided.

2) Assignment of pensions or other benefits under these Regulations will not be permitted or recognized.

3) In all questions relating to the term of employment and rates of pay of employees, the decision of the Committee, based upon these Regulations and upon the records of the Company, shall be final, provided, however, that as to service prior to June 1, 1914, the Committee shall have discretion to base its decisions upon the general intent of these Regulations and upon such information as may be obtainable from any source. As to service on or after June 1, 1914, this discretion shall not exist and the Committee shall base its decisions strictly upon the facts in the case as shown by the records of the Company.

4) Any absence from the service without pay, other than absence during a period of disability benefits, or leave of absence or temporary lay-off as defined in Paragraphs 5 and 6 of this Section, shall be considered as a break in the continuity of service unless the Board of Directors specifically authorizes the Committee to consider such absence as a leave of absence, and if any person is reemployed after such a break in the continuity of his service, his term of employment shall be reckoned from the date of such reemployment.

[fol. 84s] 5) Leave of absence shall not constitute a break in the continuity of service, but in the case of any such absence prior to June 1, 1914, which was of more than six months' duration, the period of absence shall be deducted in computing term of employment. On and after July 1, 1914, leave of absence, for the purposes of these Regulations, shall mean leave formally granted in conformity with the rules of the Company, as adopted from time to time, and, except in the case of leave granted by the Board of Directors as provided in Paragraph 4 of this Section and leave on account of continued disability following the expiration of a period of disability benefits, such leave must be obtained at or before the time the absence begins. A leave of absence for a period not exceeding one month, except a leave following expiration of disability benefits, may be granted in accordance with the rules of the Company, without approval by the Committee, and the period of absence shall be credited in computing term of employment, and

the employee shall retain eligibility to benefits during the absence. Leave of absence for any period in excess of one month shall not be effective unless approved in writing by the Committee, and in any case in which such approval is given, the Committee shall indicate whether or not the period of absence is to be deducted in computing term of employment and whether during the absence the employee shall be eligible to benefits under these Regulations. Absence following the expiration of a period of disability benefits shall be considered as a break in the continuity of service unless the employee is granted a leave of absence by the Committee, provided, however, that in its discretion, the Committee may consider any such absence as a leave of absence, if satisfactory evidence is furnished that the disability was continuous during the entire period of absence.

6) Temporary lay-off on account of reduction of force shall not be considered as a break in the continuity of service, but when the total absence from such cause exceeds six months in any twelve consecutive months, the entire period of the last temporary lay-off which extended the total absence beyond such six months in any twelve consecutive months shall be deducted in computing term of employment, and all subsequent periods of lay-off shall be so deducted until the employee shall have been continuously engaged in the performance of duty for a period of twelve consecutive months. On and after January 1, 1946, a period of lay-off shall be considered as temporary if the employee is reemployed, under such conditions as the rules of the Company, as adopted from time to time, may require, within two years. If the employee is not thus reemployed, the continuity of his service shall be deemed to have been broken. No benefits under these Regulations shall be payable during a period of lay-off.

7) Every employee who shall be absent from duty on account of sickness or injury must at once notify his immediate supervisor, and the employee shall not be entitled [fol. 84t] to benefits for time previous to such notice, unless delay shall be shown to have been unavoidable and satisfactory evidence of disability is furnished.

8) All claims for disability benefits, to be valid, must be

made within sixty days from the date of accident or from the first day of absence on account of sickness.

9) Disabled employees wishing to leave home shall obtain from the Committee written approval of absence for a specified time and furnish it satisfactory proof of disability while absent, otherwise no benefits shall be paid for such period of absence.

10) It shall be the duty of disabled employees, when their condition and location do not prevent, to call on the Committee or the Committee's representative at such times as the Committee may require.

11) A disabled employee shall not be entitled to benefits if he declines to permit the Committee to make or have made by a physician, from time to time, such examination as the Committee may deem necessary in order to ascertain the employee's condition, or if he fails to give proper information respecting his condition, or if he prevents the necessary examination by absenting himself from home without arranging with the Committee, or giving satisfactory reasons for not doing so and furnishing the necessary evidence, or if he fails to comply with notice to meet the Committee, at its offices or elsewhere, when his condition and location permit of his doing so.

12) Disabled employees must take proper care of themselves and have proper treatment. Benefits will be discontinued to employees who refuse or neglect to follow the recommendations of the Committee.

13) Death or disability resulting from infection of a cut, abrasion, scratch, puncture, or other wound not immediately disabling and not reported at the time of the occurrence causing the injury, or from sunstroke or frostbite, shall not be classed as due to accident, except at the discretion of the Committee.

14) Payments under the Plan shall be made in conformity with the financial methods of the Company and on orders of or bills prepared by the Committee or such other persons as may be designated by the Committee.

15) Disability benefits will ordinarily be paid at the same intervals of time as would govern the payment of wages to the employee if he were in the performance of duty, but at the discretion of the Committee benefits on ac-

count of continued disability may be paid monthly and on account of disability for short periods when the amounts are ascertained.

16) In case of any grave injury or chronic sickness, if the employee requests that a lump sum be paid in full settlement of all claims under the Plan and against the Company on account of such injury or sickness, the Committee may, [fol. 84u] in its discretion, make full and final settlement with the employee by commuting the benefit payments into a single lump sum payment, which payment shall be the present value computed on a fair basis, of the benefits to which the employee would become entitled during such period as his disability may reasonably be expected to continue.

17) Disability benefits or pensions accrued but unpaid at the death of an employee or pensioner may, in the discretion of the Committee, be paid to the wife of the deceased person or to some other suitable person selected by the Committee, for use in payment of expenses incident to the death of the deceased person or the disability immediately preceding, or for the benefit of any one or more persons who were dependent upon him at the time of his death.

18) Benefits payable to an employee unable to execute a proper receipt may be paid to a relative or other proper person, selected by the Committee, to use for the benefit of the employee and the receipt of such person shall be a sufficient discharge.

19) After an employee has received the maximum Sickness Disability Benefits herein provided for an employee of his term of employment, he shall not be eligible to further benefits on account of sickness until he shall have performed his duties as an employee of the Company for a continuous period of thirteen weeks. If an employee who has received Sickness Disability Benefits shall subsequently become disabled by reason of accidental injury arising out of and in the course of employment by the Company, or if an employee who has received Accident Disability Benefits shall subsequently become disabled by reason of sickness, the period during which benefits are payable on account of such subsequent disability shall not be affected by the preceding period of disability.

20) Benefits shall not be payable for both accident and sickness at the same time to the same person.

21) Granting a pension to an employee or retiring him from employment without a pension during a period of disability benefits shall not terminate or decrease his disability benefits. Granting a pension during a period of disability benefits, however, shall not entitle the employee to any payments on account of the pension, while the disability benefits continue, unless the amount of the pension is greater than the amount of the disability benefits, in which case only such amount shall be paid on account of the pension as may be necessary to make the total amount paid to such employee on account of the disability benefits and the pension equal to the amount he would have received if the pension alone had been paid.

22) "Rate of Pay" as used in these Regulations shall mean the time rate at which the employee is entitled to receive payment for services under the contract of hiring, provided, however, that if the employee's compensation is [fol. 84v] ordinarily computed on other than a time basis, the employee's average compensation (not including compensation for overtime) for so much of the preceding three months as he has been in the service of the Company, may be taken as determining the rate of pay, provided the rate thus computed is not less than the employee's time rate.

23) If an employee of this Company is an employee also of one or more other companies which have adopted plans for employees' pensions, disability benefits and death benefits, similar to that herein described and which have entered into arrangements with this Company directly or indirectly, for an interchange of the benefit obligations to which the companies may be subject under such plans, any pension, disability benefits or death benefit to which such employee or his beneficiaries may become entitled under the plans shall be computed on the basis of the total combined pay which the employee is receiving from all such companies and, except in the case of injury or death due to accident arising out of and in the course of employment by any of such companies, shall be pro-rated among the companies on the basis of the pay the employee was receiving from each company, and this Company shall only pay its share

thus determined. Any maximum or minimum amounts fixed by these Regulations for pensions, disability benefits or death benefits shall apply to the total amount payable by all companies and not to the portion payable by this Company.

24) In case of accident resulting in injury to or death of an employee which entitles such employee or his beneficiaries to benefits under these Regulations, he or they may elect to accept such benefits or to prosecute such claims at law as he or they may have against the Company. If election is made to accept the benefits, such election shall be in writing and shall release the Company from all claims and demands which the employee or his beneficiaries may have against it, otherwise than under these Regulations, on account of such accident. If any persons other than the beneficiaries under these Regulations might legally assert claims against the Company on account of the death of the employee, no part of the death benefit under these Regulations shall be due or payable until there have also been delivered to the Committee good and sufficient releases of all claims, arising from or growing out of the death of the employee, which such other persons might legally assert against the Company. The Committee, in its discretion, may require that the elections and releases above described shall release any other company, connected with the accident, with which arrangements have been made, directly or indirectly, for interchange of benefit obligations, as described in Section 9 of these Regulations. The right of the employee to accident disability benefits under these Regulations shall lapse if election to accept such benefits, as above provided, is not made within sixty days after injury, or within such greater time as the Committee shall, by resolution duly entered on its records, fix for the making of such election. [fol. 84w] 25) Should claim other than under these Regulations be presented or suit brought against the Company or against any other company with which arrangements have been made, directly or indirectly, for interchange of benefit obligations, as described in Section 9 of these Regulations, for damages on account of injury or death of an employee, nothing shall be payable under these Regulations on account of such injury or death except as provided in

Paragraph 26 of this Section; provided, however, that the Committee may, in its discretion and upon such terms as it may prescribe, waive this provision if such claims be withdrawn or if such suit be discontinued.

26) In case any judgment is recovered against the Company or any settlement is made of any claim or suit on account of the injury or death of an employee, and the amount which would otherwise have been payable under these Regulations is greater than the amount paid on account of such judgment or settlement, the difference between the two amounts may, in the discretion of the Committee, be distributed to the beneficiaries who would have received benefits under these Regulations, except that no party to any such suit against the Company shall be entitled to any portion thereof.

27) In case any benefit or pension, which the Committee shall determine to be of the same general character as a payment provided by the Plan, shall be payable under any law now in force or hereafter enacted to any employee of the Company or to his beneficiaries under such law, the excess only, if any, of the amount prescribed in the Plan above the amount of such payment prescribed by law shall be payable under the Plan, except as provided in Paragraph 28 of this Section; provided, however, that no service pension payable under this Plan shall be reduced by reason of any governmental pension payable on account of military service. In those cases where, because of differences in the beneficiaries, or differences in the time or methods of payment, or otherwise, whether there is such excess or not is not ascertainable by mere comparison but adjustments are necessary, the Committee in its discretion is authorized to determine whether or not in fact any such excess exists, and in case of such excess, to make the adjustments necessary to carry out in a fair and equitable manner the spirit of the provision for the payment of such excess.

28) A benefit or pension payment under this Plan shall be reduced by one-half the amount of any related benefit which the recipient would be entitled to receive under the Federal Social Security Act, as in effect at the time the payment is made (computed on the basis of employment included in his "term of employment" as defined in this Plan, and wages

as defined under applicable Federal law, shown by the Company's records), subject to the following conditions:

a) A service pension determined under Section 4, whether in a specified minimum or other amount, shall be adjusted by one-half the amount of the old-age insurance benefit to which a person would be entitled by reason of his above-described employment and wages (1) under the Federal Social Security Act as amended in 1950 in the case of a person retired on or before August [fol. 84x] 31, 1952, and (2) under the Federal Social Security Act as in effect on the date of his retirement in the case of a person retiring after August 31, 1952; provided, however, that such adjustment shall not exceed the amount of adjustment, as so computed, under the Federal Social Security Act as in effect at the time the service pension payment is made.

b) No adjustment shall be made to any death benefit provided under this Plan except with respect to the extent to which the benefits then payable under the Social Security Act exceed those payable under the Act as in effect on November 16, 1949.

c) In the event the Social Security Act is amended to provide for tax contributions which are different in rate as between employer and employees, the adjustment provided for in this Paragraph 28 shall be changed with respect to a benefit or pension granted thereafter by substituting for "one-half" in the computation of such adjustment the ratio which the Company's rate of tax contribution bears to the combined rate of tax imposed upon employer and employees.

29) The Committee shall publish annually to the employees a report of the operations under the Plan.

Section 9. Interchange of Benefit Obligations.

Agreement may be made by this Company with the American Telephone and Telegraph Company for an interchange with that Company and its Associated or Allied Companies, of the benefit obligations to which such Companies may be subject under plans for employees' pensions, disability

benefits and death benefits. The general provisions of such agreement will be:

a) That advance provision for the payment of service pensions shall be made by this Company in such amounts as may be necessary to provide for and fulfill all requirements of the Plan as in effect from time to time.

b) That an employee's term of employment, as hereinbefore defined, shall include employment not only in this Company and the American Telephone and Telegraph Company, but also in any other Company with which reciprocal agreements under this Plan shall have been made by the American Telephone and Telegraph Company.

c) That in case of consolidation or merger with another Company having a similar employees' benefit plan, the Pension Funds of the Companies consolidated or merged shall be combined.

Section 10. Changes in Plan.

The Committee, subject to the provisions of Section 9, with the consent of the President and subject to the approval of the Board of Directors, may from time to time make changes in the Plan set forth in these Regulations, and the Company may terminate said Plan, but such changes or termination shall not affect the rights of any employee, without his consent, to any benefit or pension to which he may have previously become entitled hereunder.

[fol. 84y] DEFENDANT'S EXHIBIT No. 1

The Benefit Plan in '49

A report to Southern Bell Employees on the operation of the Plan for Pensions, Disability and Death Benefits.

To all employees of the Southern Bell Telephone and Telegraph Company:

The Plan for Employee's Pensions, Disability Benefits and Death Benefits provides that the Committee shall pub-

lish annually to the employees a report of operations under the Plan. The Committee submits herewith its report for the year 1949.

General

The Benefit Plan was established "to furnish help to employees at times when it is most needed." In effectuating this purpose further progress was made during 1949 in decentralizing administration of the Plan by authorizing the State Benefit Committees to approve Accident Disability Benefits in their States. With this change the State Committees now have authority to approve Sickness and Accident Disability Benefits as well as Leaves of Absence, which substantially speed up handling those payments and privileges and thus in fact provides the help "when it is needed."

Organization of Committee

As of January 1, 1950, F. M. Malone was appointed to the Committee in place of E. H. Wasson. Members of the Committee, in addition to Mr. Malone, are G. D. Garner, chairman; J. A. Gantt, H. R. Stone and W. A. Thompson. R. V. Davis is secretary.

Sickness and Accidents

During the year there occurred a total of 9229 sickness cases lasting more than seven days, of which 7566 occurred among employees with over two years' service who were thus eligible to Benefits under the Plan. A total of $1,711,428 was paid as sickness disability benefits under the Plan and $1,090,583 for sickness pay during the first seven days of absence was charged to departmental expense. In connection with 214 on the job lost time accidents, a total of $88,107 was paid as accident disability benefits and expenses.

Thus in more than 7700 instances employees had to be absent from the job due to sickness of over seven days or to accidental injury. Your Committee is very glad that through the medium of our Benefit Plan it has been possible to provide payments during these periods.

Death Benefits

There were 140 deaths among active and retired employees during the year. A total of $256,433 death benefits was paid.

Pensions

At the end of the year, 1673 retired employees were receiving pensions, an increase of 135 during the year. Of these, 1322 were service pensions, the security of which is provided by the Pension Trust Fund. At the end of the year this Fund amounted to $55,155,804 irrevocably set aside for the sole purpose of paying service pensions.

On November 16, 1949 the Plan was amended in respect to the minimum pension provisions. The conditions under which employees become eligible to pension and the fundamental formula for computing the amount of the pension was not changed. This formula remains the same—1% of the average annual salary over the last 10 years (or the highest 10 consecutive years) multiplied by the number of years service, represents the computed annual amount of the pension. Prior to the November 16th amendment, if this computed amount was less than $50 a month, full time employees who retired on pension with 20 or more years service would receive the minimum pension of $50 per month, less ½ Social Security Primary Insurance Benefits. Under the amended plan, all full time employees retired on pension with 20 years or more service will receive a pension payment which, when added to their Social Security Benefit, will equal at least $75 per month until they reach age 65 and not less than $100 per month after that age. As a result of this amendment to the Plan, 1225 employees already retired immediately received increased pension payments. The value of this increased income to these retired people can best be gauged by the voluntary expressions received from them, some of which have been published in the Southern Telephone News.

With this change our Plan, already a liberal one, retains its standing in the very forefront of industrial benefit and

pension plans, a comparative position which it has enjoyed since its beginning in 1913.

Employee's Benefit Committee

G. D. Garner, Chairman
J. A. Gantt
E. M. Malone
H. R. Stone
W. A. Thompson
R. V. Davis, Secretary

[fol. 84z]

DEFENDANT'S EXHIBIT No. 3

Whereas, Paragraph 5 of Section 8 of the Plan for Employees' Pensions, Disability Benefits, and Death Benefits of the Company, provides that any absence from the service without pay, other than absence during a period of disability benefits, or leave of absence, or temporary lay-off, as defined in Paragraphs 6 and 7 of said Section, shall be considered as a break in the continuity of service unless the Board specifically authorizes the Benefit Committee to consider such absence as a leave of absence; and,

Whereas, this Board, at its meeting of June 25, 1929, authorized the Employees' Benefit Committee to consider certain specified breaks in the continuity of, or absence from the service, as leaves of absence "(Automatic Rule for Bridging Breaks in Service)" and it is desirable now to extend this authority to bridge breaks in service in cases of lay-offs exceeding two years, resulting from force reductions due to abnormal business conditions;

Resolved: That this Board hereby authorizes the Employees' Benefit Committee in all cases where the facts are sufficient, in the opinion of said Committee, to warrant such action, to consider as a leave of absence, in advance of completion by the employee of ten years of continuous service after the termination of the absence, any absence from the service which began during the period from July 1, 1930 to August 31, 1933, inclusive, due to force reductions, where the person is reemployed prior to January, 1937,

provided the employee was credited with at least one year's service at the time he was laid off.

Approved by Directors, A. E. Mix, Secretary, Sept. 23, 1935.

8/23/37 Expiration date extended to 1/1/38

[fol. 84aa]

DEFENDANT'S EXHIBIT NO. 4

Excerpt from Minutes of Meeting of Board June 23, 1925.

On motion, it was

Resolved: that the resolution adopted by this Board at a meeting held March 27, 1917 vesting the Employees' Benefit Committee with authority respecting the handling of sickness or accident cases outside the Benefit Plan, matters relating to the physical examination of prospective employees and loans or salary advances to employees, be and it hereby is rescinded.

On motion, it was

Resolved: that the Employee's Benefit Committee, in addition to the duties which devolve upon it under the Plan for Employees' Pensions, Disability Benefits and Death Benefits, be vested with jurisdiction over the following matters, with authority to take all necessary actions and to make payments in connection therewith, this authority to be subject to such rules or limitations as the Executive Committee or the President may from time to time prescribe, such matters being

(1) Relief measures, including the payment of salary during absence from work, in cases of sickness or death of active employees or of accident to them, when such cases are not provided for or in the Committee's judgment are inadequately provided for by the Plan for Employees' Pensions, Disability Benefits and Death Benefits.

(2) Temporary relief in cases of sickness or death of employees retired on pension or of accident to them, when such relief is necessary in order to prevent or alleviate serious distress, provided however that pay-

ments for such relief shall not exceed $500 in any one case, except on approval of the President.

(3) Loans or salary advances to active employees in cases of financial emergency or distress.

[fol. 84bb] (4) Measures relating to the physical examination of prospective employees, to the supervision of the health of employees and to the care for sick or injured employees.

No part of the payments to be made or expected to be incurred in connection with the foregoing matters under the above authorities shall be paid out of the Employees' Benefit Fund.

On motion, it was

Resolved: that said Employees' Benefit Committee be and it hereby is authorized to delegate to any officer or other employee of this Company or to a committee or committees created or appointed by it and consisting of officers or other employees of this Company, such powers and duties with respect to the administration of any or all of the above granted authorities as will result, in the judgment of said Employees' Benefit Committee, in the more effectual administration of said authorities.

[fol. 84cc]

DEFENDANT'S EXHIBIT No. 5

Whereas the Board of Directors, at its meeting of April 24, 1944, authorized the Employees' Benefit Committee to make "Other Benefit" payments in certain cases where an employee of this Company dies while absent on military leave granted with eligibility to death benefits under the "Plan for Employees' Pensions, Disability Benefits and Death Benefits," and it is now desired to accord "Other Benefit" treatment in certain other cases not included within that authority;

Resolved: that, effective August 1, 1946, in any case in which, because of the provisions of Section 8, Paragraph 27 of the "Plan for Employees' Pensions, Disability Benefits and Death Benefits" the disability pension, disability benefit or death benefit otherwise payable under the Plan is reduced

or eliminated by reason of governmental payments of the same general character, payable only upon the death or disability of a person having former military service, the Employees' Benefit Committee is authorized and directed as follows:

1. Disability Pensions and Disability Benefit Cases—"Other Benefit" payments shall be made to the employee or pensioner in amounts equal to the deductions from the benefit or disability pension otherwise provided under the Plan which result from such governmental payments.

2. Death Cases—(a) If the employee or pensioner is survived by any of the beneficiaries described in Section 7, Paragraph 4 a of the Plan, "Other Benefit" payments shall be made to or on behalf of such beneficiary or beneficiaries in an amount equal to the deduction from the maximum death benefit provided under the Plan which results from such governmental payments. (b) If the employee or pensioner leaves no surviving beneficiary as described in Section 7, Para- [fol. 84dd] graph 4 a of the Plan, but is survived by any of the beneficiaries described in Section 7, Paragraph 4 b of the Plan, "Other Benefit" payments, not to exceed the amount that would be deducted from the maximum death benefit if the case arose under subparagraph (a) above, may, in the discretion of the Employees' Benefit Committee, be made to or on behalf of such beneficiary or beneficiaries.

3. The "Other Benefit" payments to be made in the cases described in paragraphs 1 and 2 above will ordinarily be paid in the same manner and will be subject to the same regulations as are provided in the Plan for disability pensions, disability benefits or death benefits as the case may be. In the event that a death benefit under the Plan is payable in a case in which "Other Benefits," as described herein, are also payable, such "Other Benefits" will commence upon completion of the death benefit payments under the Plan.

Approved by Directors, Sept. 23, 1946.

[fol. 84ee] DEFENDANT'S EXHIBIT NO. 6

Financial Statements

The financial statements which follow on pages 30 to 33 are summaries of the accounts of the Southern Bell Telephone and Telegraph Company. Since January 1, 1913, the Company has maintained its accounts in accordance with Uniform Systems of Accounts prescribed for telephone companies by Federal authorities—originally by the Interstate Commerce Commission and, since July, 1934, by the Federal Communications Commission.

As required by the effective Uniform System of Accounts, "Telephone Plant in Service," "Telephone Plant Under Construction," and "Property Held for Future Telephone Use" are stated at cost to the Company except that property included therein which was acquired from a predecessor owner is stated at its original cost when first dedicated to public use. The amount classified as "Telephone Plant Acquisition Adjustment" represents certain costs attributable to property purchased from predessor owners.

H. R. Stone, Comptroller.

[fol. 84ff]

COMPARATIVE BALANCE SHEET

ASSETS

		Dec. 31, 1949	Dec. 31, 1948
Plant and Other Investments:			
Telephone Plant (See Page 29)		$783,106,119	$684,070,223
Comprises land and buildings, rights of way, poles, wire, cable, underground conduit, switchboards, telephones, office furniture, vehicles, tools, etc. At December 31, 1949, this property was classified in the accounts as follows:			
Telephone Plant in Service	$770,838,533		
Telephone Plant Under Construction	11,396,986		
Property Held for Future Telephone Use	514,848		
Telephone Plant Acquisition Adjustment	325,752		
Miscellaneous Physical Property		141,832	258,629
Real estate not now held for telephone purposes.			
Other Investments (at cost)		4,294,469	3,326,419
Stocks	$ 4,287,725		
Miscellaneous Items	6,744		
Total Plant and Other Investments		$787,542,420	$687,655,271
Current Assets:			
Cash		$ 6,653,277	$ 9,161,272
Temporary Cash Investments (U. S. Treasury Bills)		2,996,997	
Special Deposits		1,555,494	1,556,562
Working Funds Advanced to Employees		309,691	309,088
Current Receivables		30,352,277	26,286,214
Amounts due for service (less reserves of $279,924 at December 31, 1949), toll settlements and miscellaneous items.			
Material and Supplies		8,687,504	9,935,569
Principally for construction and maintenance purposes.			
Total Current Assets		$ 50,555,240	$ 47,248,705
Prepaid Accounts and Deferred Charges:			
Prepayments		$ 2,112,375	$ 1,922,106
Taxes, cost of directories and other expenses applicable to period after close of year.			
Deferred Charges		911,994	1,189,537
Total Prepaid Accounts and Deferred Charges		$ 3,024,369	$ 3,111,643
Total Assets		$841,122,029	$738,015,619

[fol. 84gg]

LIABILITIES

	Dec. 31, 1949	Dec. 31, 1948
Capital Stock	$435,000,000	$355,000,000
Par value of common stock outstanding. (At December 31, 1949, 5,000,000 shares authorized, 4,350,000 shares outstanding.)		
Funded Debt:		
Forty-year 3% Debentures, due July 1, 1979	$ 25,000,000	$ 25,000,000
Thirty-year 2¾% Debentures, due September 1, 1972	35,000,000	35,000,000
Forty-year 2¾% Debentures, due August 1, 1985	45,000,000	45,000,000
Forty-year 2⅞% Debentures, due July 1, 1987	75,000,000	75,000,000
Total Funded Debt	$180,000,000	$180,000,000
Current and Accrued Liabilities:		
Advance Billing for Service and Customers' Deposits	$ 6,871,153	$ 5,657,888
Accounts Payable and Other Current Liabilities	28,361,290	29,821,802
Amounts owing for payrolls, supplies, toll settlements, and miscellaneous items.		
Accrued Liabilities Not Due	20,484,464	14,060,948
Taxes	$ 17,665,040	
Interest	2,289,583	
Rents	529,841	
Total Current and Accrued Liabilities	$ 55,716,907	$ 49,543,638
Deferred Credits:		
Unextinguished Premium on Funded Debt (After deduction of unamortized discount.)	$ 2,222,336	$ 2,281,520
Other Deferred Credits	71,097	83,834
Total Deferred Credits	$ 2,293,433	$ 2,365,354
Depreciation Reserve	$157,632,710	$144,596,048
Provision to meet loss of investment in Telephone Plant upon its ultimate retirement from service.		

Earned Surplus Reserved			$	$ 3,138,252
Reservations against contingency of refunds to customers in connection with certain pending rate proceedings.				
Unappropriated Earned Surplus			$ 10,478,979	$ 3,372,327
Analysis of Change During 1949:				
Net Income (see page 33)	$ 22,776,897			
Adjustment of Federal Income Tax for prior years	541,848			
Transfer from Earned Surplus Reserved of amounts reserved in prior years	3,138,252			
Miscellaneous additions	8,610			
Total additions	$ 26,465,607			
Dividends declared	$ 18,987,500			
Abandoned projects	146,903			
Miscellaneous deductions	224,552			
Total deductions	$ 19,358,955			
Net increase	$ 7,106,652			
Total Liabilities			$841,122,029	$738,015,619

H. R. STONE
Comptroller

[fol. 84hh]

	Year 1949	Year 1948
Local Service Revenues	$144,205,837	$117,602,491
Toll Service Revenues	95,412,442	88,093,555
Miscellaneous Revenues Revenues from directory advertising, rents, and miscellaneous sources.	11,093,203	9,345,881
Less—Uncollectible Operating Revenues Provision for revenues which may be uncollectible.	1,054,036	790,256
Total Operating Revenues	$249,657,446	$214,251,671
Current Maintenance	$ 51,979,626	$ 47,205,878
Depreciation Expense Provision to meet loss of investment when depreciable property is retired from service, based on rates for the different classes of property designed to spread this loss of investment uniformly over its service life. Represents approximately 4.6% and 4.4% of average investment in depreciable plant in service for 1949 and 1948, respectively.	29,132,268	23,652,439
Traffic Expense Costs incurred in handling messages, principally operators' wages.	58,042,369	55,629,600
Commercial Expense Costs incurred in business relations with customers; pay station commissions; also the cost of directories, advertising, etc.	22,491,012	19,877,265
Operating Rents	5,816,840	4,979,774
General and Miscellaneous Expenses:		
Executive and Legal Departments	889,380	808,689
Accounting and Treasury Departments	9,930,291	9,030,311
Provision for Employees' Service Pensions (See Note)	7,643,003	6,772,900
Employees' Sickness, Accident, Death and Other Benefits	2,308,819	2,204,152
Services Received Under License Contract	2,385,825	2,687,145
Engineering Expense	1,549,739	1,216,461
Other General Expenses	722,807	654,021
Less—Expenses Charged Construction	2,365,704	2,254,904
Total Operating Expenses	$190,476,275	$172,464,631
Net Operating Revenues	$ 59,181,171	$ 41,787,040
Operating Taxes:		
Federal Taxes on Income	$ 12,060,487	$ 6,545,384
Other Taxes Principally state, local, and social security.	19,258,589	16,349,828
Total Operating Taxes	$ 31,319,076	$ 22,865,212
Net Operating Income (Carried forward)	$ 27,862,095	$ 18,921,828

[fol. 84ii]

	Year 1949	Year 1948
Net Operating Income (Brought forward)	$ 27,862,095	$ 18,921,828
Other Income	995,551	1,137,549
Interest charged construction, dividends and miscellaneous income:		
Miscellaneous Deductions From Income (See Note)	654,358	615,869
Income Available for Fixed Charges	$ 28,203,288	$ 19,443,508
Interest on Funded Debt	$ 5,106,250	$ 5,106,250
Other Interest	379,324	410,009
Less—Release of Premium on Funded Debt—Net	59,183	59,569
Total Fixed Charges	$ 5,426,391	$ 5,456,690
Net Income	$ 22,776,897	$ 13,986,818

NOTE: Total current accruals for employees' service pensions amounted to $8,122,837 for 1949 and $7,252,734 for 1948 of which amounts $479,834 for each year was charged to Miscellaneous Deductions from Income in order to comply with accounting requirements of the Federal Communications Commission. The Company and its independent public accountants consider that the latter amount was, in fact, a current operating expense.

H. R. STONE
Comptroller

Lybrand, Ross Bros. & Montgomery

Certified Public Accountants

Certificate of Audit

Southern Bell Telephone and Telegraph Company,
Atlanta, Georgia.

We have examined the balance sheet of Southern Bell Telephone and Telegraph Company as of December 31, 1949, and the related statement of income for the year 1949. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, the financial statements (pages 30 to 33) present fairly the position of Southern Bell Telephone and Telegraph Company at December 31, 1949, and the results of its operations for the year 1949, in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year.

LYBRAND, ROSS BROS. & MONTGOMERY

Atlanta, Georgia,
February 3, 1950.

[fol. 84jj]

Trustee's Report of Pension Trust Fund

Established by

Southern Bell Telephone and Telegraph Company

Balance in Fund—December 31, 1948		$ 46,742,224
Additions to Fund During 1949—		
Payments into Fund by Company	$ 8,122,837	
Interest Revenue, including gain or loss on investments disposed of	1,354,962	
Total Additions	$ 9,477,799	
Disbursements for pensions during 1949	1,064,219	
Net Increase in Fund		8,413,580
Balance in Fund—December 31, 1949		$ 55,155,804
Comprised of—		
Bonds of Bell Telephone Companies		$ 8,314,140
U. S. Government Obligations		19,751,852
Public Utility, Railroad and Industrial Bonds		26,172,319
Other Investments		446,920
Cash and accrued interest not due		470,573
Total		$ 55,155,803

Note: Securities are shown on amortized basis.

BANKERS TRUST COMPANY, *Trustee*

By W. B. DUNCKEL, Vice President

New York, N. Y.—January 24, 1950.

[fol. 84kk] DEFENDANT'S EXHIBIT No. 7

COMPTROLLER GENERAL'S OFFICE
STATE OF GEORGIA
ATLANTA

Comptroller General,
Insurance Commissioner,
Georgia Safety Fire Commissioner

Zack D. Cravey
Georgia
Fulton County

I, Zack D. Cravey, Insurance Commissioner of the State of Georgia, hereby certify that I have not licensed the Southern Bell Telephone & Telegraph Company to engage in the business of health & accident insurance, nor is any information on file in my office that the said company has ever been licensed by this office or the insurance commissioner to engage in any kind of insurance business.

In witness whereof, I have hereunto set my hand, and caused the seal of the Comptroller General of the State of Georgia to be affixed in the city of Atlanta on this 5th day of January, 1955.

[SEAL] Zack D. Cravey, Insurance Commissioner

[fol. 85] IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ARGUMENT AND SUBMISSION—Feb. 8, 1956

(Omitted in printing)

[fol. 86] IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15655

UNITED STATES OF AMERICA, Appellant,

versus

GORDON P. HAYNES and ESSIE M. HAYNES, Appellees.

Appeal from the United States District Court for the Northern District of Georgia.

OPINION—April 20, 1956

Before BORAH, TUTTLE and BROWN, Circuit Judges.

TUTTLE, Circuit Judge: This appeal from a judgment of the district court in favor of the taxpayer raises the question whether payments made by his employer during sick leave, under the employer's disability benefit plan, are exempt from taxation under the provision of Section 22(b)(5) of the Internal Revenue Code of 1939, which exempts [fol. 87] "amounts received through . . . health insurance . . . as compensation for . . . sickness."[1]

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[1] The applicable statute is as follows:

Internal Revenue Code of 1939:

Sec. 22. GROSS INCOME.

(b) [as amended by Secs. 113 and 127, Revenue Act of 1942, c. 619, 56 Stat. 798] Exclusions From Gross Income.—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

. . . . . .

(5) Compensation for injuries or sickness.—Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 23(x) in any prior taxable year, amounts received through accident or health insurance or under workmen's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on

Taxes are a creature of statute. It is thus the duty of the Court to look to the statute and if the incidence which makes the tax applicable exists, then the tax follows perforce; but if it does not exist, then it is not within the province of the Commissioner of Internal Revenue, by regulations, or the Courts, by judicial legislation, to bring something within the ambit of a tax that Congress has not placed there. This rule must, of course, work both ways. In devising a scheme of taxation Congress may well discern an area of limited dimensions in which it considers that special relief is indicated. It may then determine that carving out a special exemption will not cut so deeply into anticipated revenues as to cause the favoring of the limited class to bear too heavily on the great bulk of the taxpayers. Congress must then [fol. 88] be able to enact a statutory exemption for such limited area with its restricted revenue loss with the assurance that such exemption will not be broadened by judicial fiat into something covering a much larger area and involving manifold greater revenue loss.

Here Congress provided an exemption from gross income of "amounts received . . . through . . . health insurance . . . as compensation for . . . sickness." The taxpayer seeks to have included in such exemption amounts paid to the employe by the employer which in fact comes to him as a continuation of his regular salary during sick leave.

Both parties, in their briefs, discussed at length the particular terms of the voluntary plan put into effect by the employer, the Southern Bell Telephone & Telegraph Company, under which it provided pay benefits to sick or injured employes on a sliding scale, varying from full pay for four weeks, and half pay thereafter for nine weeks for an employe with from 2 to 5 years' service, up to full pay for a year for an employe, such as taxpayer, with 25 years or more. We think the details of the plan are relatively un-

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account of such injuries or sickness, and amounts received as a pension, annuity, or similar allowance for personal injuries or sickness resulting from active service in the armed forces of any country;

. . . . . .

(26 U.S.C.A. 1952 ed., Sec. 22.)

important, since it cannot be disputed that there is no separate contract or agreement of insurance covering an obligation to pay any amounts to the company's employees. We think it clear that when Congress limited the exempt payments to "amounts received through health insurance" it had a concept, clearly stated, of amounts the payment of which was definitely and with binding force fixed by an insurance contract between the employe and an insurer or [fol. 89] between the employer and an insurer for the specific benefit of the employe.

In the trial court there was evidence to the effect that sickness and health insurance was not ordinarily written for full salary amounts; that the employer here did not make payments on an actuarial basis in relation to the amount of risk or to any other factor of age, state of health, or anything else; that no reserves were set up as is ordinarily done in the case of insurance, and that benefits were voluntarily fixed by a management committee. The importance of this evidence is not to prove that the company's plan here was unlike insurance, but it was relevant and of great weight to the proposition that when Congress exempted only such amounts as come "through health insurance," it had a clearly defined class in mind, and that this class is readily identified by normally having a bundle of attributes or characteristics associated with the term "insurance." This class of persons whose payments were exempt were those who, for a definite consideration, having an actuarial relation to the benefits provided, paid by them or on their behalf, obtained insurance coverage under ordinary insurance standards. There was thus an ascertainable amount of gross income involved, from which an estimate of loss of revenue to the government could be made. This loss would obviously be quite different from the loss that would result if the class designated by Congress was made to include every employe who received payments of salary or wages by the voluntary action of his employer during sick leave.

[fol. 90] Our reference to the loss of revenue is not intended to suggest that such loss has any part in enabling the Court to construe a tax statute. The government makes no such argument here and we would not consider it if made. The reference to the differing impacts upon the revenue is

cited to indicate that Congress, in adopting an overall scheme of taxation in which the revenue loss of each exemption plays an important part, must choose words of description to set apart those taxpayers or payments within the exemption. In this case the term "through insurance" was the terminology adopted by Congress for this purpose.

We think it clear, without resort to any but the fundamental rule that words are ordinarily to be taken to mean what they usually import to the average person, that Congress meant to give the exemption here only to amounts received through insurance. If it had intended that all payments received as compensation for sickness were to be exempt it would, of course, not have used the words "through insurance" at all. They would clearly have been superfluous and misleading if that had been the intent of the lawmakers.

Appellee here relies on the decision of the Court of Appeals for the Seventh Circuit in *Epmeier v. U. S.* (7 Cir.), 199 F. 2d. 508, by which case the trial court doubtless felt bound. Although there are present in the Epmeier case facts that might warrant our distinguishing it from the case before us, we think that even those facts are unimportant in construing the statute here before us. In Epmeier the employe was working for an insurance company, a com-[fol. 91] pany which had the authority to issue health insurance, although no health insurance had actually been issued by it to cover the payments involved in that litigation. The nature of the employer's business was stressed by the Court, but it also construed the purpose of the statute as "to relieve a taxpayer who has the misfortune to become ill or injured, of the necessity of paying income tax upon insurance benefits received to combat the ravages of disease or accident."

With deference to the views of that distinguished Court, we are of the opinion that the purpose of the statute was to exempt from income tax the proceeds of insurance which had been bought and paid for by the payment of premiums consciously and knowingly made for "health insurance." Whatever the activating motive of Congress may have been in passing the law, its intent was clear that the exemption was to apply only to payments received through insurance. The payments made to the taxpayer here by the Southern

Bell Telephone & Telegraph Company during his absence on sick leave were not such payments. They had no relation to health insurance. See *Moholy v. U. S.*, 132 F. Supp. 32 (N.D.Cal.), pending on appeal C.A.9; *Branham v. U. S.*, 136 F. Supp. 342 (D.C.Ky.); and *Herbkersman v. U. S.*, 133 F. Supp. 495 (S.D. Ohio), pending on appeal C.A. 6. These cases deal with similar questions, the first two having been decided by the district court in favor of the government, the third in favor of the taxpayer.

The judgment of the trial court erroneously construed the exemption statute as covering payments which were not, in fact, received through health insurance. It must be reversed and judgment rendered for the appellant.

Reversed and rendered.

[fol. 92] Brown, Circuit Judge, Dissenting:

Admonished as we are, and almost invariably at the behest of the Tax Collector that "Questions of taxation must be determined by viewing what was actually done * * * and when applying the provisions of the Sixteenth Amendment and income laws enacted thereunder, we must regard matters of substance and not mere form * * *" *Weiss v. Stearn*, 265 U.S. 242, 68 L.Ed. 1001; "* * * The incidence of taxation depends upon the substance of the transaction * * *." *Commissioner v. Court Holding Co.*, 324 U.S. 331, 89 L.Ed. 981, the result here is difficult to comprehend. For it is the triumph of form over substance. Form is the absolute monarch here not only in requiring *a* contract, but in specifying the type of contract, the nature of the considerations which business men must have applied, and the specific guaranties required.

To be more specific, in the Court's eye, it must be a contract of insurance, named as such, issued by one having unquestioned legal authority to underwrite, calling for the payment of premiums and specifying ascertainable, legally enforceable obligations. The Court states it several ways, but always adds up the same:

> "We think the details of the plan are relatively unimportant, since it cannot be disputed that there is no separate contract or agreement of insurance covering

an obligation to pay any amounts to the company's employees * * *."

And, again, the Congressional concept of the phrase "amounts received through health insurance" is stated to be, "amounts the payment of which was definitely and with [fol. 93] binding force fixed by an insurance contract between the employee and an insurer or between the employer and an insurer for the specific benefit of the employee * * *." The Congressional concept of the *type* of contract is expanded then into a concept as to the *class* of persons affected. But as to the class and as to the type, it is the *paper* which counts: "This class of persons whose payments were exempt were those who, for a definite consideration, having an actuarial relation to the benefits provided, paid by them or on their behalf, obtained insurance coverage under ordinary insurance standards * * *."

I can find no basis for these conclusions either in the inquiry concerning the intent and purpose of Congress as it acted in its dual capacity of creator and defender of the public Treasure, or in the analysis of the factors underlying the nature of insurance. On this latter phase I feel that the Government's contention, essentially adopted by the Court, suffers from two underlying defects: first, it is not for the Government to decide what free men ought to consider a fair bargain, and second, the record and contention that this arrangement lacks the qualities of insurance evidences a surprising lack of understanding of the nature of modern insurance.

As to the Congressional motivation, I accept, of course, the Court's statement that it is not entering into the field of legislative wisdom. I do not for a moment think that the Court bases its conclusion upon the prospective loss of revenue. This supposed concern of Congress is, however, put forward as a likely or probable explanation for the use of [fol. 94] the terminology "through insurance." I am unable either to see any basis for the argument or where it gets us.

I do not know how Congress, in 1939, could keep its legislative grace "within bounds" for succeeding years by knowing then the extent to which health and accident insurance had become a part of the contemporary social-economic

life. Perhaps there is the thought that the situation was automatically, albeit somewhat unconsciously and certainly informally, reviewed from session to session as Congress met, impliedly reapproved the 1939 concept, and then adjourned without amendment. But, finally, since Congress in 1939 could not possibly know the amounts which would be paid in 1949 either as insurance under contracts of insurance or as benefits under employer plans, I hardly see how the proper legislative concern with impact on probable revenues aids us at all.

When it comes to the analysis of the Telephone Company's arrangement here, I must confess that I am confused as to just what the Court does with it. After detailing briefly the supposed deficiencies as an insurance contract, the Court first states, "The importance of this evidence is not to prove that the company's plan here was unlike insurance * * *." But while disavowing such purpose, apparently out of regard to the view this Court has always taken that it is not for Government to intrude itself upon the reasonableness of business agreements made between free men, it arrives at the same result, for instead of saying that the arrangement was "unlike insurance," it merely holds that the beneficiaries of this plan are not within the *class* of persons who have rights under an insurance contract; for [fol. 95] the Court says, "* * * but it was relevant and of great weight to the proposition that when Congress exempted only such amounts as come 'through health insurance', it had a clearly defined class in mind, and that this class is readily identified by normally having a bundle of attributes or characteristics associated with the term 'insurance.'"

I would think that if the plan was sufficiently "like" insurance as to be "insurance" then the beneficiaries of the plan would be within the class of persons covered by "insurance." In this respect it seems to be another argument advanced as proof but then withdrawn.

If so, then premise and conclusion stand alike in terms: Congress said "amounts received through accident or health insurance"; therefore, Congress meant payments made under health insurance contracts.

But the exact mechanism of the Court's process of reasoning is not, in my judgment, significant because, basically,

the attack made by the Government, sustained by the Court, that because of certain supposed deficiencies the arrangement lacks the *quality* of an insurance contract simply will not bear analysis.

There is, first, no magic about an insurance contract. Like any other, it is merely an agreement to pay ascertainable sums upon the happening of indicated contingencies in return for the payment of some consideration. Where the question is whether a person assuming the obligations of an insurer is engaged, or may engage, in the insurance business, as such, the problem may become more complex in [fol. 96] determining whether such person has complied with the common and numerous statutory requirements regulating that particular business.' But here the question is not whether Southern Bell Telephone and Telegraph Company may engage in the general insurance business. The question is: have they made a contract of insurance. If a contract of insurance has been made between the Telephone Company and its employees, it is not open to the Government to challenge its validity on some supposed corporate infirmity or the like. *Charlotte Union Bus Station, Inc.* v. *Commissioner*, 4 Cir., 209 F.2d 586; Francis M. Camp, 21 BTA 962; *J. N. Wheelock et al.* v. *Commissioner*, 16 TC 1435. The elements of an insurance contract are few and simple.[1] The nature of the contract, the agreement to insure, is not

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[1] 44 C.J.S., Insurance:

Page 471, "*Definition.* Fundamentally it is an agreement to pay a sum on the happening of an event, and has been said to be best defined as a contract whereby one undertakes to indemnify another against loss, damage or liability arising from an unknown or contingent event. More broadly, however, the term 'insurance,' or 'insurance contract,' or 'insurance policy,' in the sense of the subject matter with which it deals, denotes a contract by which one party, for a compensation called the 'premium,' assumes particular risks of the other party and promises to pay to him or his nominee a certain or ascertainable sum of money on a specified contingency * * *."

See also page 477, Disability Insurance, and page 480, Health Insurance.

determined by its form or the label affixed to it; it is judged on substance.[2]

The form is so unimportant that the contract to insure may be oral. 29 American Jurisprudence, Insurance §§127, 129 and, generally, §126.

[fol. 97] But the Court, obsessed with its conviction that the contract of insurance must be in a particular form issued by a particular company, waves all of this to one side because, "the details of the plan are relatively unimportant." The synoptic analysis set forth in Appendix I amply demonstrates that this arrangement satisfied the requirements of a contract[3] of insurance.

The attack on the plan for its intrinsic deficiencies from an insurance standpoint fares no better.

At the outset this should be recognized for what it is: it is the intrusion again of the Commissioner into the business affairs of citizens. He has the right, of course, to impose and collect the taxes incident to the performance of the contract. But he does not have the right to say what contract shall be made nor what consideration shall be followed, nor

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[2] 29 American Jurisprudence, Insurance, §4: "The name by which a company * * *, or its certificates or policies, are designated is not determinative of the question whether * * * its contracts are in the nature of insurance policies * * *. The nature of a contract as one of insurance depends upon its contents and the true character of the contract actually entered into or issued—that is to say, whether a contract is one of insurance is to be determined by a consideration of the real character of the promise or of the act to be performed, and by a consideration of the exact nature of the agreement in the light of the occurrence, contingency, or circumstances under which the performance becomes requisite * * *."

[3] Appendix I is taken verbatim from Taxpayer's brief and illustrates well how material may be effectively presented with graphic force and convenience to the Court.

Undoubtedly impressed by this technique the brief of Robert K. Jewett and Thomas E. Berry, Esqs., *amici curiae*, following a similar format, contains a tabular comparison of the Haynes, Epmeier and Herbkersman cases and is included as Appendix II.

what may be considered a good bargain. He cannot do this directly, nor can he do it by the favorite administrative device of the oblique approach in which, it is urged, the transaction as the Taxpayer says it occurred, could not have occurred because such a course would have been unreasonable.

[fol. 98] But granting the Commissioner the right to supervise contracts, to assay them from the standpoint of inherent business reasonableness or unreasonableness, to give him an over-the-shoulder gentle guidance to business transactions, his objections here are quite inadequate.

It is contended that since the plan calls for the payment of the full weekly salary for the stated periods, there is no incentive upon the part of the employee to return to work, and this stands in contrast to the ordinary commercial policy limiting weekly indemnity to 75 to 80%.[4] Likewise, it is said that since the Company, in its intracompany accounting, charged payments under the disability plan to operating expense; carried them as one of the specified items under the general category of salaries and wages rather than as plan benefits similar to the way they did for payments into the pension fund; maintained no special reserve account; payments were based on salary only not on some actuarial standards; benefits were available to all employees without a specific medical examination; and the company was not obliged to pay premiums over and above the cost of the actual weekly benefits paid kept this from being insurance. Similarly, complaint is made that the administration of the plan is finally in the hands of Company executives whose decision is stated to be final. This proves, it is claimed, that the plan is a gratuitous arrange-[fol. 99] ment only with no contractual obligations and

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[4] Just what is the source of the statements made by the Government concerning the insurance business is quite obscure. Certainly not in this record comprising as it does only the vaguest of words from a local, general agent for one private health and accident company whose testimony, on the whole, shows that he neither posed as an industry-wide expert, nor was he attempting to state the variable conditions upon which underwriters would be bound.

which is further borne out by the fact that no suit has ever been filed under it.

But all of these contentions ignore the real nature of the insurance business. One thing stands out in the long history of the development of insurance: it came into being out of the business necessity of hedging and protecting against contingent hazards. It is the business man then who determines in the first instance what is needed and the nature and extent of the protection sought. The underwriter lays down the terms most generally by adjusting the cost of the insurance upwards or downwards. In this way underwriters will literally insure anything. If a business, therefore, such as the Telephone Company, determined, as it in its judgment saw fit, that good business called for an insurance policy awarding weekly benefits equivalent to this plan, it is certain that it could, and would, be quickly underwritten. The fact that the required insurance called for the payment of 100% of the employees' salary instead of 75 to 80% would, if material at all, be adjusted in the rate. The same would be true concerning the supposed moral risk as payment of the equivalent of full weekly wage is thought to destroy the incentive to return to work. The element cannot be a big one because for the first five years of employment, the full wage benefit is payable only for four weeks and, on a graduated scale, it finally works up to a maximum of fifty-two weeks after twenty-five years. An underwriter might well consider that the personnel standards of the insured company were such as to likely attract and hold conscientious people of high moral responsibility who would not be [fol. 100] beguiled into malingering by the lure of these limited payments. The underwriter would undoubtedly take into account also the counter incentive to remain on the job to assure advancement in pay and position with its cumulative effect of increasing future disability benefits and pension and retirement advantages.

Moreover, this whole argument ignores the widespread postwar development in the field of health and accident insurance in which reliable companies are offering a variety of packaged benefits designed to help the breadwinner over periods of disability from accident or disease.

Health and accident insurance is not normally written upon a prior health examination and even the so-called expert conceded this. Nor is there any basis in the industry for the Government's contention that payments are based upon some actuarial standard. On the contrary, they invariably call for the payment of fixed weekly indemnities.

The premium cost might, in commercial insurance companies, be determined on a so-called actuarial basis, but no underwriter could hope to have a better experience upon which to calculate his premium than that of the Southern Bell Telephone Company whose plan has been in operation since 1913. This leads to the very curious argument that it cannot be insurance because it only costs the Telephone Company what it pays out, and if it were insurance, they would either pay less or pay more. We have progressed far beyond the naive idea that loss is not sustained merely because it is insured. Business knows now that ultimately it [fol. 101] bears its own losses, so that insurance is more and more a catastrophe stop loss and an efficient claims adjusting service. So, wh- for one year or so, the premium cost to the Telephone Company might be much less than the total payments made to employees, it would not be long until there was a reliable ratio between known probable income and outgo. One of the interesting manifestations of the new business point of view toward the real loss is the growth of retrospective rating plans of one kind or another. In this system the ultimate premium paid is dependent upon the particular assured's own loss experience. There are infinite variations in these plans, but in the main they call for the payment of a premium equivalent to losses plus an added arbitrary percentage for claims handling and overhead with or without, at added cost, catastrophe-stop losses. It then becomes a matter of pure business judgment whether any real purpose is to be served by the entry of an insurance company and its policy. Frequently, this is required by external statutory provisions, such as Workmen's Compensation, Motortruck Carrier, Cargo and Public Liability Insurance, Compulsory Automobile Insurance, or the like. But where external conditions do not require the entry of an insurance company, it is but

an ordinary business problem to determine the probable cost by self-insurance as opposed to outside insurance.

This leads naturally to another demonstration that the requirement of an insurance company contract is artificial indeed. Whatever the corporate power under Georgia Law of the Telephone Company to write insurance, it could easily have organized its own health and accident insurance [fol. 102] affiliate. The Company would not have to worry about losses, reserves, or the like because whatever the subsidiary paid out, it would know that it would have paid the same to the employees under the plan. Likewise, being a part of a large family of integrated Telephone Companies, it could easily have organized with other company members of AT&T a mutual insurance company or a Reciprocal Exchange. The essence of each is that the insured is also insurer. Since the exposures would be consistent and uniform, the losses ultimately would fall substantially on each participating member company. The cost then would be what it has always been.

Of course, it is a little absurd to elaborate on what must be such an obvious economic fact: if experience over the years by Southern Bell Telephone Company shows the payment of stated sums as plan benefits, it is obvious that the cost through insurance policies would have to be at least as much and likely more. There is nothing in Section 22(b)(5) to require that an employer discard his own business judgment in appraising the alternative means of giving employees health and accident insurance benefits. Large companies frequently self-insure property and liability exposures of millions of dollars. Unless the Commissioner has the right to veto it, there is no reason why the same policy cannot be followed on a health disability plan whose risks, it must seem obvious, are slight. The criticism that there are no reserves as such, or that the plan is administered by Company executives is likewise superficial. Of course, it is the Commissioner again trying to tell the employee that the security of his "insurance" contract is no good [fol. 103] because there is not a special reserve posted or the management may be prejudiced. But disregarding this, there is no showing that ample funds are not available or that security would better be assured by frozen funds. If

one were required, the Commissioner would likely again enter the picture to determine the nature and kind of investments and perhaps might criticize an investment by the Telephone Company in its own or affiliates' stocks even though our Government follows somewhat the same practice with Social Security revenues.

That there has not been a suit for 30 years over the plan does not prove it lacks legal enforceability. And, again, just what kind of a contract would satisfy the Commissioner? Suppose the employee belongs to a Fraternal lodge which issues a policy or a certificate? Suppose, as is quite common, it is his labor union that provides a specific benefit against specific premium contributions? Is it any less "amounts received through * * * insurance" if, as is so common, the bylaws of the lodge or union vest absolute power in the officers and presumably prohibit claim or suit? Nor is there any assurance that courts would not protect these beneficiaries if, under the terms of the plan, certain weekly benefits had accrued by prior service but were arbitrarily denied by the Telephone Company.

I have discussed these contentions in some detail because I think it important that in this situation it is imperative that substance be the rule of reason.

This plan has all of the attributes of insurance. It is not necessary to satisfy the statute that the plan adhere [fol. 104] to the underwriting principles of any one particular health and accident insurer. Viewed from the standpoint of its reasonableness as an insurable undertaking, the plan is one which would find great acceptance at a premium cost which could soon be calculated. Since it is the Telephone Company's money which will be spent in either case, it has determined in its wisdom that it is better as a business proposition for them to bear the direct and full costs of this, rather than resort to an external third party. By this means, the Telephone Company is able to transfer from the shoulders of its employees the risks of loss of essential income during periods of illness or injury. The employees have paid a valuable consideration for the risk which the employer has taken on. Their "premium" payment has been made through the services performed for the Company

under the employment contract which includes, as a part, this plan:

The statute requires, of course, *insurance* payments. I would certainly agree that mere generosity on the part of an employer in continuing wages would not qualify. But where the employer's plan, carefully integrated and long maintained, makes definite provisions for the payment of specified sums over and above and beyond the wages or salary for work done, the plan and the payments under it should be treated as insurance since that is what it is in fact.

With much deference, I must, therefore, dissent.

[fol. 105]

APPENDIX I TO DISSENTING OPINION

ELEMENTS OF A CONTRACT OF INSURANCE (44 C.J.S. 940)

PROVISIONS OF PLAN IN INSTANT CASE WHICH SATISFY THE ELEMENTS OF AN INSURANCE CONTRACT:

SUBJECT MATTER

"The Southern Bell Telephone and Telegraph Company undertakes in accordance with these Regulations, to provide for the payment of definite amounts to its employees when they are disabled by accident or sickness or when they are retired from service, or, in the event of death, to their dependent relatives." (Pltf. Ex. 1, p. 5.)

RISK OR CONTINGENCY INSURED AGAINST

Loss of income because of employee's inability to work due to sickness. (Pltf. Ex. 1, p. 5, Sec. 1; p. 12.)

THE DURATION OF THE RISK OR CONTINGENCY

Schedule, Pltf. Ex. 1, p. 6, Sec. 6, Para. 2:—

from (a) 2 to 5 years of employment—full pay 4 weeks, half pay 9 weeks.

to (f) 25 years or more of employment—full pay 52 weeks.

Benefits begin on eighth calendar day of absence on account of disability. (Pltf. Ex. 1, p. 12, Sec. 6, Para. 3; also R/40.)

[fol. 106]

Benefits terminate when disability ceases, or period set out in Para. 2 ends. (Pltf. Ex. 1, p. 12, Sec. 6, Para. 1.)

A PROMISE TO PAY OR TO INDEMNIFY IN A FIXED OR ASCERTAINABLE AMOUNT

Schedule of amounts set out in Sec. 6, Para. 2 of the Plan, page 12, Pltf. Ex. 1.

A PREMIUM

Services rendered by the employee:—

Epmeier vs. United States, 199 F.2d 508:

". . . . . service and labor rendered by plaintiff employee to employer was adequate consideration without payment of premium . . . . ."

Herbkersman vs. United States, 133 F. Supp. 495:

p. 496:—"While no monetary consideration is paid by the employee for the protection afforded under the Plan, the acceptance of employment with the Plan being a feature thereof constitutes a full and adequate consideration; consideration need not necessarily be a transfer of money, it may be anything of value."

C.J.S. Vol. 44, page 1323, Para. 349:

[fol. 107]

THE PERIOD OF PAYMENT OF THE PREMIUM

"While premiums are ordinarily payable in cash, the insurer may accept or authorize payment otherwise than in cash."

AN AGREEMENT OF THE PARTIES ON ALL THE ESSENTIAL ELEMENTS

I. T. 4015, C.B., 1950-1, 23, at p. 25:

"The employees' rights to receive benefit payments under a voluntary plan in consideration of their employment and the employer's obligation to pay the benefits satisfy the requirements of contract. Furthermore, it seems clear that the contract is one of insurance, as a voluntary plan assures and promises each qualified employee a fixed compensation for a fixed period in the event accident or sickness renders him unable to work. Such assurance is the basic function of an insurance contract. Therefore, such a plan also meets the requirements of Section 22 (b) (5) of the Code."

Employee must work two years in order to be eligible for benefits. Pltf. Ex. 1, p. 12, Sec. 6, Para. 1; also R/22, 24.

Plan is a part of employment contract between employer and employee.

[fol. 108]

"Each employee on entering the service of the Company will be given a copy of this pamphlet . . . . ." (Pltf. Ex. 1, p. 4.)

The following chart shows some additional elements of insurance as set out in the case of *Epmeier vs. United States*, 199 F. 2d 508:

ADDITIONAL ELEMENTS OF INSURANCE DISCUSSED IN EPMEIER CASE:

UNDER PLAN IN INSTANT CASE:

From employee to employer. Pltf. Ex. 1, p. 5, Sec. 1, Para. 1.

A SHIFTING OF THE INCIDENT OF RISK FROM ONE TO ANOTHER.

Herbkersman vs. United States, 123 F. Supp. 195:

"Under the Plan the employer undertakes to assume the risk which would otherwise be borne by the employee

of loss of income during periods of disability resulting from sickness, and the risk is thereby transferred from the employee to the employer and this transfer of risk creates

"CONTRACTUAL" SECURITY

in itself a contract of insurance." (p. 496.)
Part of contract of employment.

Epmeier vs. United States, 199 F.2d 508:

[fol. 109]

"But we know of no reason why insurance protection must be expressed in a formal contract."
"(4) As we have indicated, we know of no reason why this insurance, when provided as part of the contract of employment between employee and employer, must follow any stereotyped or conventional form. Surely there is no legal magic in form; the essence of the arrangement must determine its legal character. We conclude that the fact that there is no formal contract of insurance is immaterial, if it is clear, as here, that, for an adequate consideration, the company has agreed and has become liable to pay and has paid sickness benefits based upon a reasonable plan of protection of its employees."
C.J.S. Vol. 44, p. 1018, Insurance, Para. 249:
"No particular form of words is required to constitute a contract of insurance."

MEDICAL EXAMINATION PRIOR TO EMPLOYMENT

Not required here.

TREATMENT BY PHYSICIAN DURING DISABILITY

Pltf. Ex. 1, p. 19, Para. 11, 12:

[fol. 110]

"(11) A disabled employee shall not be entitled to benefits if he declines to permit the Committee to make or have made by a physician, from time to time, such examination as the Committee may deem necessary in order to ascertain the employee's condition. . . ."

"(12) Disabled employees must take proper care of themselves and have proper treatment. Benefits will be discontinued to employees who refuse or neglect to follow the recommendations of the Committee."

Epmeier vs. United States, 199 F.2d 508:

(2) . . . . :"The employee is required while ill, to follow the instructions of his physician or the company's physician, a provision closely akin to features of ordinary insurance, where the insurer is interested in avoiding extension of any resulting loss beyond that which can be reasonably avoided."

CONTRACT MAY BE REVISED

Pltf. Ex. 1, page 23, Sec. 10:

"The Committee, subject to the provisions of Section 9, with the consent of the President and subject to the ap-

[fol. 111]

proval of the Board of Directors, may from time to time make changes in the Plan set forth in these regulations, and the Company may terminate said Plan, but such changes or termination shall not affect the rights of any employee, without his consent, to any benefit or pension to which he may have previously become entitled hereunder."

Epmeier vs. United States, 199 F.2d 508:

(4) . . . . "The provision that the terms of the agreement may be changed does not impinge upon the soundness of this conclusion. Employment contracts are always subject to revision. If the terms of such changes are not satisfactory to the employee, he may terminate his service; he can not be forced to work under conditions repugnant to his sense of what is fair and proper. It is obvious also, we think, that no change could be made to defeat or lessen the liability, once it had attached. In the provisions lies the implicit agreement to pay the benefits until and unless the terms should be modified; no such modification

could reduce the liability for sickness benefits after illness had intervened."

[fol. 112] *C.J.S. Vol. 44, Insurance, para. 255, page 1031:*

"Contents" . . . . "a contract of insurance is a voluntary one, and the parties thereto have a right to incorporate therein such provisions and conditions as they see fit to adopt, provided the conditions and provisions are not in violation of law or public policy."

Appendix II to Dissenting Opinion

[fol. 113-114]

	Haynes (Southern Bell Telephone & Telegraph Company Plan)	Epmeier (Lincoln National Life Insurance Co. Plan)	Herbkersman American Telephone & Telegraph Company Plan)
1. Plan stated in written document or booklet distributed to employees.	Yes.	Yes.	Yes.
2. Employee consideration found in employment services rendered—no separate contribution by employees.	Yes.	Yes.	Yes.
3. Duration of benefits based upon length of employment.	Yes.	Yes.	Yes.
4. Amount of benefits (a) based upon salary (b) equivalent to full salary.	(a) Yes. (b) Yes as applicable to Haynes—not determinable as applicable to all employees.	(a) Yes. (b) Not determinable.	(a) Yes. (b) Not determinable.
5. Applicable to all regular employees who have passed a medical examination as an incident to employment.	Yes (medical examination not required.)	Yes.	Yes (does not appear in that employees take medical examination before hired).

6. Benefits commence with first day of illness.	Generally on eighth day of illness, but first day in some cases; regular salary paid during first week and charged as sickness benefits on company records.	Inferable but not definitely determinable.	No payments made for first seven days of absence.
7. Employee while ill required to follow instructions of his or company physician.	Yes.	Yes.	Inferably yes since confirmation of illness by own or company physician required.
8. No benefits for illness or injury due to alcohol, immoralities, brawling, etc.	Not determinable.	Not determinable	Not determinable.
9. Administration of plan.	Committee of 5 appointed by directors from heads of operating departments approves payments.	Office Administration Department. Right to cancel if fullest cooperation not given.	Not determinable.
10. Plan benefits and salary in single check.	Yes.	Not determinable.	Yes, if absence occurs in same pay period as regular payment for actual service.
11. Costs of benefits not determinable under actuarial tables, and no funded reserve.	Yes.	Not determinable.	Not determinable.
12. Plan subject to termination not to affect rights accrued prior thereto.	Yes.	Yes.	Yes.

[fol. 115] IN UNITED STATES COURT OF APPEALS

No. 15655

UNITED STATES OF AMERICA

versus

GORDON P. HAYNES and ESSIE M. HAYNES

JUDGMENT—April 20, 1956

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and judgment here rendered for appellant, United States of America.

"Brown, Circuit Judge, dissenting."

[fol. 116] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 117] SUPREME COURT OF THE UNITED STATES,
October Term, 1956

No. 257

GORDON P. HAYNES and ESSIE M. HAYNES, Petitioners,

vs.

UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI. Filed October 8, 1956.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.